

A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate “Path”

KATHLEEN M. SCANLON*

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* Senior Vice President and Director of Public Policy Projects, CPR Institute for Dispute Resolution, 366 Madison Ave., New York, NY 10017; Adjunct Associate Law Professor, Fordham University School of Law. I am most appreciative of the helpful comments and suggestions on earlier drafts by Professor Carrie Menkel-Meadow, Professor Jacqueline Nolan-Haley, Michael Isby, and Elizabeth Plapinger. I am grateful to all the Circuit Mediators who responded to my inquiries, with special thanks to Gary F. Canner (Circuit Mediator, United States Court of Appeals, Eleventh Circuit) and Mori Irvine (Circuit Mediator, United States Court of Appeals, Eleventh Circuit).

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I. INTRODUCTION

A disturbing disjunction exists in the federal court system at the appellate level, which, if left unaddressed, can undermine the public’s confidence in the judicial system and its integrity on many levels. The disjunction involves the flourishing of court-financed appellate mediation programs to assist parties in settlement on the one hand,¹ and the disregard of the impact of these judicial programs in settlement-related vacatur case law on the other.

¹ See, e.g., JUDITH MCKENNA ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 26–32 tbl. 17 (2000); ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS 3–4 (1997). See also *infra* pp. 425–30 app. Mediation programs have also flourished at the federal district court levels. See ELIZABETH PLAPINGER & DONNA SIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS (1996).

Settlement is a commonplace occurrence in the litigation process,² including at the appellate stage.³ A settlement reached during the appeal phase may include a request to vacate the lower court judgment.⁴ Vacatur is an equitable remedy, which a court can grant if it determines appropriate.⁵ One particular category of vacatur requests—those relating to vacating judgments to assist settlements—acts as a lightning rod for many policy questions involving the proper role of courts and settlement activities.⁶

² Most cases that are filed eventually result in settlement. Typically only a small fraction culminate in a trial, and a small portion of these go on to become appeals. See generally Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986).

³ See *infra* note 29. See also Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Richard A. Posner, *Mediation*, Text of Eleventh Annual Frank E.A. Sander Lecture for the American Bar Association's Section of Dispute Resolution (July 8, 2000) (transcript on file with author). Cf. MCKENNA ET AL., *supra* note 1, at 4 tbl.1 (Of 53,148 appeals filed in 1998, only slightly more than half—25,846 (51%)—were terminated on the merits.); JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 tbs.S-1 and B, available at <http://www.uscourts.gov/judbus2000> (Of 54,697 appeals filed during 12 month period ending September 30, 2000, only half—27,516 (50%)—were terminated on the merits.).

⁴ Vacatur requests to assist settlements reached in the course of appellate mediation programs occur and, although not in large numbers, often are critical to the settlement. Telephone interviews with circuit court mediators serving in the Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits (Oct. 2, 2000–May 25, 2001) (notes on file with author). See Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233, 235–36 (1989) (explaining that vacatur is frequently viewed as an important tool for encouraging parties to settle pending appeal). See also Stephen R. Barnett, *Making Decisions Disappear: Depublication & Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1070 n.205 (1993) (offering one empirical study that estimated that in about one percent of the cases settling while an appeal was pending in the California intermediate appellate courts, parties sought to have an appellate court do something other than dismiss); Fisch, *supra* note 3, at 590 (“The *Nestle* court [Second Circuit] and most commentators view vacatur after settlement as a useful tool in encouraging settlements and reducing appellate caseloads.”).

⁵ See *infra* Part III.A.

⁶ See generally Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992); Fisch, *supra* note 3; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Galanter & Cahill, *supra* note 2; Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996); David Luban, *Settlements & the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Kevin C. McMunigal, *The Costs of Settlement:*

Critics of vacating judgments to assist settlements contend that such a practice undermines the integrity of the judicial process by converting judgments into bargaining chips. Defenders contend that settlement-related vacatur is appropriate if it enables parties to reach a consensual resolution, rather than a court-imposed one. They contend without vacatur, parties may be forced to litigate an issue that they can settle.⁷

Both sides of the debate claim efficiency for their side. The critics claim that the loss of precedent caused by vacatur translates into an inefficient use of court resources. The defenders claim that denial of vacatur to assist settlements results in the inefficient use of judicial resources because both parties and courts needlessly devote time to a claim that can be settled.⁸

In this Article, I introduce another thread to the settlement-related vacatur debate—the disjunction between vacatur case law and the growing institutionalization of appellate court mediation programs. When parties request vacatur of a lower court judgment to assist settlement, the prevailing trend is to deny the request.⁹ In a pivotal case, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,¹⁰ the U.S. Supreme Court pronounced that to allow a settling party who “steps off the statutory [appeal] path” to use vacatur to erase a judgment would compromise the significance of judicial precedent and “disturb the orderly operation of the federal judicial system.”¹¹ Absent “exceptional circumstances,” a party surrenders any claim to the equitable remedy of vacatur when it voluntarily abandons its right to appeal.¹² Since *Bonner Mall*, both circuit and district courts have applied a vacatur standard that is focused on party conduct. However, completely

The Impact of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. REV. 833 (1990); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnick, *Managerial Judges*]; Judith Resnick, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) [hereinafter Resnick, *Whose Judgment?*]; Kent D. Syverud, *The Duty To Settle*, 76 VA. L. REV. 1113 (1990); Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229 (1993); David A. Rammelt, Note, *“Inherent Power” and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?* 65 IND. L.J. 965 (1990).

⁷ See *infra* Part III.A.

⁸ See *infra* Part III.A.

⁹ See *infra* Parts III.B.–III.D.

¹⁰ *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18 (1994).

¹¹ *Id.* at 27.

¹² *Id.* at 27, 29.

missing from the current application of the standard is consideration of the courts' active roles in detouring parties off the traditional appellate path to explore settlement through court-financed mediation programs,¹³ which often mandate participation.¹⁴

Using the federal courts as a framework,¹⁵ in this Article I will argue that the parties' participation in appellate court mediation programs should be factored into a court's analysis when determining whether to vacate a judgment to assist settlement. Otherwise, an ironic situation arises where the courts are financing and ordering parties into appellate mediation programs on the one hand and on the other automatically punishing the parties if a settlement results by denying any resulting vacatur request on the basis that they freely abandoned their appeal and removed themselves from the traditional appellate "path." I suggest that such an inconsistent position undermines the orderly operation of the judicial system and its integrity, a fundamental concern underlying the *Bonner Mall* decision. The disjunction, I contend, between vacatur case law and the growth of appellate mediation programs will do more harm to judicial integrity than a thousand vacaturs ever would.

My endeavor is separated into four parts. Part II describes the conditions that gave rise to federal appellate mediation programs and provides an overview of their growth and success. I discuss the court financing and staffing of these programs, case selection methods, mandatory features and the focus on promoting and expediting settlement.

In Part III, I summarize the issues and concerns underlying the debate over the propriety of post-judgment vacatur to assist settlement. I then examine relevant vacatur case law at the U.S. Supreme Court, circuit and district court levels, and discuss the absence of any consideration of appellate mediation programs in these decisions.

In Part IV, I examine the implications of the disjunction between vacatur case law and the continuing growth of appellate mediation programs. I contend that the rigid application of the *Bonner Mall* standard creates two serious jurisprudential and practical anomalies: it requires a strained judicial application of the case law, and it limits the effectiveness of appellate mediation programs. I suggest that the consequences of the disjunction

¹³ See *infra* Parts III.B.–III.D.

¹⁴ See *infra* Part II.B.

¹⁵ State courts in about half the states have appellate ADR programs, generally mediation or mediation-like settlement conferences. See Robert J. Niemic, *On Appeal—Mediation Becoming More Appealing in Federal and State Courts*, DISP. RESOL. MAG., Summer 1999, at 13. Although this Article does not explicitly address state court programs, many of the observations and proposals may be instructive.

between the case law and appellate mediation programs include the specter of serious diminishment of public confidence in the orderly operation of the judicial system.

In Part V, I raise proposals for reform and focus on a proposal in which courts would include participation in appellate mediation programs as one of several factors to consider when deciding a post-judgment vacatur request to assist settlement. I argue that a more elastic application of the *Bonner Mall* standard is appropriate and discuss two appellate court decisions that provide a sound template for such an approach. Moreover, after addressing potential abuses of such an approach, I conclude that compelling jurisprudential and public policy grounds support factoring parties' participation in appellate mediation programs into the analysis.

II. OVERVIEW OF APPELLATE MEDIATION PROGRAMS IN FEDERAL CIRCUIT COURTS

A. *The Rise of Federal Appellate Mediation Programs*

An explosive growth in appellate litigation in the federal courts of appeals has been occurring over the past few decades.¹⁶ From 1977 to 1993 the growth of appellate dockets was so dramatic that the number of appeals nearly tripled.¹⁷ Moreover, during roughly the same period, the number of appellate filings grew at a rate almost four times greater than the rate of growth in active circuit judgeships.¹⁸ Since 1996, filings of appeals have continued to climb.¹⁹ By necessity, the federal appellate courts have had to implement efficient case management techniques, which have included the establishment of appellate mediation programs.²⁰

¹⁶ See Jerrold J. Ganzfried, *Bringing Business Judgment to Business Litigation: Mediation and Settlement in the Federal Courts of Appeals*, 65 GEO. WASH. L. REV. 531, 533 (1997).

¹⁷ See CAROLE KRAFKA ET AL., FED. JUDICIAL CTR., *STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS* 7 (1995).

¹⁸ See JUDITH A. MCKENNA, FED. JUDICIAL CTR., *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES* 17-19 (1993).

¹⁹ See JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000, at 13-14, available at <http://www.uscourts.gov/judbus2000/front/2000artext.pdf> (showing that since 1996, filings of appeals have climbed five percent).

²⁰ Other case management techniques include the use of summary or unpublished opinions. See *infra* note 159.

Appellate mediation programs—often called conferences—find their basis in Rule 33 of the Federal Rules of Appellate Procedure. Rule 33 grants appellate courts authority to direct parties into settlement discussions:

The court may direct the attorneys—and when appropriate the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of a conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.²¹

Inspired by district court mediation programs, in 1974, the Second Circuit implemented a pioneer Civil Appeals Management Plan (CAMP).²² The goal of CAMP was to assist litigants resolve their appeals on a consensual basis and without the need for a final decision by the court.²³ A CAMP conference was scheduled in nearly all civil cases docketed in the court. At the conference, a court-employed staff counsel served as an impartial mediator to explore settlement, educate the parties on the law and practice in the Second Circuit, and resolve procedural problems informally and expeditiously.²⁴ Throughout the span of its existence, the Second Circuit CAMP has reported very impressive settlement results and significant savings in judicial resources.²⁵

Since the inauguration of CAMP in the Second Circuit, all twelve of the U.S. courts of appeal have established mediation programs under Rule 33 and local circuit rules,²⁶ with the exception of the Federal Circuit.²⁷ The

²¹ FED. R. APP. P. 33.

²² Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253, 261 (1988).

²³ *Id.* at 261–62.

²⁴ NIEMIC, *supra* note 1, at 26–27.

²⁵ Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 11 (1990) [hereinafter Kaufman, *Reform for a System*] (“CAMP settles more cases than two judges would normally handle in a year at one-third the costs of two judicial chambers.”); Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Program*, 95 YALE L.J. 755, 758–61 (1986) [hereinafter Kaufman, *Must Every Appeal*] (indicating data showed that CAMP “reduce[d] by one-sixth the number of cases argued”).

²⁶ See NIEMIC, *supra* note 1, at 2–3; *infra* pp. 425–30 app.; see also Niemic, *supra* note 15.

cumulative results have been an improvement in overall case management²⁸ and an increase in settlements.²⁹ These programs have enabled the courts to accommodate increased filings without the need and expense of additional judges.³⁰ Moreover, these programs can result in an increase in savings and

²⁷ The Federal Circuit Court's settlement discussion rule, FED. CIR. R. 33, requires parties, through counsel, to discuss settlement within seven days after filing of the principal briefs. Moreover, the Federal Circuit Court's process differs from other federal appellate conference programs in that court staff is not involved in scheduling or conducting conferences. *See infra* pp. 425–30 app.

²⁸ *See* JAMES B. EAGLIN, FED. JUDICIAL CTR., THE PRE-ARGUMENT PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION 8 (1990) (reporting that a 1985–1986 study confirmed that the Sixth Circuit conference program was meeting one of its stated objectives of lessening case management burdens by clarifying procedural matters); NIEMIC, *supra* note 1, at 3–4; U.S. COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APPELLATE MEDIATION PROGRAM 2 (1998) (“Issues and positions are clarified in the mediation process so that, even if settlement is not achieved, the Court benefits from more efficient briefing.”), available at <http://www.cadc.uscourts.gov/common/refdesk/handbook/camediat.pdf>.

²⁹ *See, e.g.,* MCKENNA ET AL., *supra* note 1, at 84 (“The [Third Circuit] reports that the [appellate mediation] program settles or disposes of approximately 90–100 cases per year.”); THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, MEDIATION AND GUIDELINES FOR EFFECTIVE MEDIATION REPRESENTATION 17 (“Each year hundreds of appeals are resolved through the mediation program.”); Ganzfried, *supra* note 16, at 539 (finding that the D.C. Circuit mediation program since 1989 has had a 31% settlement rate and in 1996 reported a 35% settlement rate); *Seventh Circuit Launches Mediation Program*, 5 WORLD ARB. & MEDIATION REP. 252, 252 (Nov. 1994) (stating that the Sixth Circuit program reported a 44% resolution rate requiring no judicial intervention as opposed to the normal attrition rate of 20%); Honorable Dorothy Nelson, Address at the CPR Winter Meeting Presentation (Jan. 25, 2001) (stating that in 2000, the Ninth Circuit had over 1,000 cases submitted with an 80% settlement rate); Sixth Circuit Mediator Robert Rack, Achieving Quality in Service in Federal Court-Sponsored ADR Programs: Critical Values & Concerns, Address at ABA Dispute Resolution Annual Meeting (2001) (noting that of the 200 to 250 cases mediated by the four staff mediators, there was a 45% settlement rate, which is equivalent to the work of 1.5 appellate judges). *See also* CAL. TASK FORCE ON APPELLATE MEDIATION, MANDATORY MEDIATION IN THE FIRST APPELLATE DISTRICT OF THE COURT OF APPEAL REPORT AND RECOMMENDATIONS iii–iv (2001) (reporting a 43% settlement rate in a two-year pilot program and recommending an extension of program because achieved goals of “reducing costs, time to resolution, and the adversary nature of litigation, while increasing dispositions without judicial intervention and litigation satisfaction with the judicial process”), available at <http://www.courtinfo.ca.gov/reference/documents/mediation.pdf>.

³⁰ The Seventh Circuit's mediation program saves roughly one year's worth of a judge's time and enables the court to avoid having to ask Congress to authorize an additional judgeship. *See* EAGLIN, *supra* note 28, at 6 (reporting a 1985–1986 study conducted confirmed that a Sixth Circuit conference program was meeting one of its stated objective of saving judges time by facilitating settlement and early termination of

party satisfaction by providing an opportunity to reach a consensual resolution early in the appeal process.³¹

In light of these favorable and impressive results, it is not surprising that the Judicial Conference has consistently supported these appellate programs.³² One circuit mediator has opined that "[t]o the best of [my] knowledge, this support has been based on the appellate judges' recognition of the efficacy of these programs and their value to the courts in terms of docket relief, case management assistance, and good service to litigants."³³

cases without judicial involvement; data indicated the program was conducting the work of 1.06 appellate judges); MCKENNA ET AL., *supra* note 1, at 84 ("The [Third Circuit's] appellate mediation program was designed to conserve judicial and party resources by facilitating settlement . . ."); *id.* at 98 ("The [Fourth Circuit's] Office of the Circuit Mediator provides settlement assistance to reduce the caseload of the judges of the circuit, save taxpayer money, and save the time and money of litigants and their counsel."); U.S. COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *supra* note 28, at 1 ("Mediation was originally intended to supplement the Court's 1986 Case Management Plan, which was undertaken to accommodate a sixty percent increase in filings and pending cases over a two-year period. The Appellate Mediation Program has a significant impact on the Court's workload. Cases that are settled do not proceed to oral argument, thus saving the time of judges and law clerks who would otherwise prepare for argument."); Posner, *supra* note 3.

³¹ See EAGLIN, *supra* note 28, at 9 (reporting that over 50% of responding attorneys surveyed in a 1985-1986 Sixth Circuit conference program study "expressed the view that the program resulted in net savings in time spent on the appeal"); U.S. COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *supra* note 28, at 1 ("[Mediation] was also intended to help parties by curtailing the expense involved in protracted appeals and to encourage the development of creative resolution options . . ."). See also CAL. TASK FORCE ON APPELLATE MEDIATION, *supra* note 29, at 12 (finding that two-year pilot program achieved substantial savings for the parties and court—in appeals that settled through mediation, counsel estimated the cumulative savings for the parties in excess of \$7.1 million).

³² "First by granting them separate budget authority, and second by exempting them from the 84% staffing limits imposed on all other Judiciary staff operations." Letter from Robert W. Rack, Jr., Chief Circuit Mediator, Sixth Circuit Court of Appeals, to Hon. Walter H. Rice, Chief Judge, United States District Court, Southern District of Ohio (Jan. 14, 1999) (on file with author).

³³ *Id.*

B. Features of Appellate Mediation Programs

1. Overview

Mediation provides a process and setting in which parties can explore settlement possibilities and voluntarily agree upon a consensual resolution.³⁴ In comparison with trial court litigation, appellate litigation does not offer as many opportunities or motives for exploring settlement.³⁵ Appellate mediation programs are structured to change these settlement dynamics.

Appellate mediations are designed to assist parties, with the aid of a mediator, explore the consequences of not settling and to generate settlement possibilities.³⁶ Factors typically considered in determining whether to pursue a settlement at the appellate stage include the probabilities of winning or losing on appeal, the possibility of alternatives better suited to resolve the parties' interests, and the costs and time disruptions involved to perfect an appeal.³⁷ One circuit mediator has described the process as follows:

Every effort is made to generate offers, counteroffers, and alternative settlement options until the parties either settle or know the case cannot be settled. Where it is possible, the mediator will assist the parties in resolving related trial court cases, frequently in an attempt to achieve a 'global settlement' of various lawsuits.³⁸

Without appellate mediation programs, many settlement discussions and settlements may never occur between the parties at this stage.³⁹

³⁴ See *infra* Part II.C. See also Stephen O. Kinnard, *Mediating the Decided Case—What To Expect if You're Looking To Settle at the Appellate Level*, DISP. RESOL. MAG., Summer 1999, at 16.

³⁵ For example, during the pre-trial phase of litigation, counsel are frequently in contact with one another concerning depositions, document productions, and motion practice. Natural opportunities arise for counsel to mention settlement proposals. Even if counsel is reluctant to raise the subject, it is common practice for district judges and magistrate judges to raise settlement at a pretrial conference. Ganzfried, *supra* note 16, at 537.

³⁶ Mori Irvine, *Better Late than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341 (1999).

³⁷ *Id.* at 346.

³⁸ *Id.* at 350.

³⁹ See CAL. TASK FORCE ON APPELLATE MEDIATION, *supra* note 29, at 11 ("Many attorneys don't take the initiative for settlement negotiations at the appellate level. By instituting mediation, the Court of Appeal both removes the onus of taking the first step and afford a forum for settlement discussions."), *available at*

Incentives for settlement often decrease as appellate briefing and oral argument preparation progresses.⁴⁰ To address this dynamic, appellate mediations typically are scheduled to occur before the filing of the appellate briefs.⁴¹ The mediation conference is generally conducted in a series of joint and separate sessions with the mediator. Mediators work with counsel to select a location that is convenient for all participants. Where the circuit boundaries encompass large states—for example, the Fifth, Sixth, Ninth, and Tenth Circuits—a large percentage of conferences take place over the telephone.⁴² Teleconferences are noted for their convenience, efficiency, and cost-effectiveness.⁴³ In the more geographically compact circuits—for example, the First, Second, Third, and the District of Columbia—most conferences are held in person.

Confidentiality is a critical component of any mediation program.⁴⁴ All of the sessions are confidential. The mediator does not make a report to the court, and the parties are prohibited from making any reference to the mediation in motions, briefs, or argument.⁴⁵

www.courtinfo.ca.gov/reference/documents/mediation.pdf; EAGLIN, *supra* note 28, at 9 (reporting nearly 80% of responding attorneys surveyed in a 1985–1986 Sixth Circuit conference program study indicated that they “would not have taken the initiative to approach the opposing side about settlement”).

⁴⁰ See Niemic, *supra* note 15, at 14.

⁴¹ See *id.* at 13.

⁴² See *id.* at 14. A Tenth Circuit Mediator estimated that more than 95% of his mediations are conducted using teleconferences. Tenth Circuit Mediator David Aemmer, *Mediation on Appeal: What It Is and Why It Works*, Address at the ABA Dispute Resolution Annual Meeting (2001). See also 4TH CIR. L.R. 33 (“Mediation conferences will generally be conducted by telephone. . . .”); 10TH CIR. L.R. 33–1(B) (“Conferences are conducted by telephone unless the circuit mediation office directs otherwise.”); U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *THE SETTLEMENT CONFERENCE PROGRAM* (2001) (“When all participants reside in the Chicago metropolitan area, Rule 33 conferences are usually held in the Settlement Conference Office at the United States Courthouse. Otherwise, conferences are generally conducted by telephone.”), available at http://www.ca7.uscourts.gov/conf_aty/Scoprgm.htm.

⁴³ Niemic, *supra* note 15.

⁴⁴ See generally UNIF. MEDIATION ACT (2001); UNIF. MEDIATION ACT reporter’s notes (2001).

⁴⁵ See, e.g., U.S. Court of Appeals for Fifth Circuit General Order Governing the Appellate Conference Program 2 (Mar. 27, 2000) (providing confidentiality protections), available at http://www.ca5.uscourts.gov/clerk/clerk_home.cfm; 1ST CIR. L.R. 33; 3D CIR. L.R. 33.5(c); 4TH CIR. L.R. 33; 6TH CIR. L.R. 33(c)(4); 8TH CIR. L.R. 33A(c); 9TH CIR. L.R. 33–1; 10TH CIR. L.R. 33.1(D); 11TH CIR. R. 33–1(e); D.C. CIR. R. APP. P. app. III (providing communications are privileged); U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *supra* note 42 (providing Rule 33 conferences are confidential),

Pre-meeting submission of papers setting forth the parties' positions and interests generally are not required.⁴⁶ Mediators may begin conferences by asking parties to discuss all the issues in the case, not just those being appealed. The purpose of these broad-based discussions is to explore all of the issues and to evaluate the risks for both sides. Private, or caucus, sessions are often more candid than the joint session, and typically the information revealed in these private sessions is not shared with the other side, unless the participants permit the mediator to transmit it.⁴⁷

In most cases, there is extensive follow-up activity to the initial session, including additional telephone calls, in-person conferences, and private conferences with the individual parties.⁴⁸ As a result, appellate mediation discussions may continue for days, weeks, or longer.⁴⁹ Generally, the mediation does not significantly alter the briefing schedule, if at all. However, each circuit's particular procedure needs to be consulted on this matter.⁵⁰

2. Court-Financed and Staffed

Each circuit finances its appellate mediation program.⁵¹ The programs generally are available to the parties at no charge.⁵² In the majority of

available at http://www.ca7uscourts.gov/conf_aty. See also Mori Irvine, *A Look at Mediation*, NAT'L L.J., Aug. 27, 2001, at B10.

⁴⁶ The D.C. and Third Circuits require such submissions, the Eleventh Circuit encourages them and the other circuits do not explicitly address them. Panel Observation, *Mediation on Appeal: What It Is and Why It Works*, Address at the ABA Dispute Resolution Annual Meeting (2001).

⁴⁷ Irvine, *supra* note 36, at 349.

⁴⁸ *Id.* at 350.

⁴⁹ Mori Irvine, *The Lady or the Tiger: Dispute Resolution in the Federal Courts*, 27 U. Tol. L. Rev. 795, 799 (1996).

⁵⁰ See 3D CIR. L.R. 33.3 ("If a case is referred to mediation, a briefing schedule shall be deferred during the pendency of mediation unless the court or special master determines otherwise."); 9TH CIR. L.R. 33-1 circuit advisory committee n. (providing briefing schedule remains in effect unless adjusted by a court mediator to facilitate settlement); D.C. CIR. R. APP. P. app. III (providing cases in mediation remain subject to normal scheduling for briefing and oral argument); U.S. Court of Appeals for Fifth Circuit General Order Governing the Appellate Conference Program (Mar. 27, 2000) (providing time for filing of briefs not tolled automatically); U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *supra* note 42 (stating briefing is only postponed until after the initial conference, absent an order), available at http://www.ca7.uscourts.gov/conf_aty/Scoprgrm.htm; Irvine, *supra* note 45 (stating that the case proceeds on schedule).

⁵¹ Niemic, *supra* note 15, at 15.

programs, staff attorneys with prior mediation experience or training are employed by the court to conduct the mediations.⁵³ In some courts, senior federal judges serve as mediators,⁵⁴ and in at least one court program, the services of pro bono lawyers trained as appellate mediators are used.⁵⁵

3. Case Selection Methods

How a particular case on appeal is scheduled for mediation can vary from program to program. However, the selection process can be divided basically into two stages—eligibility and assignment.

a) Eligibility

Although many similarities exist between the rules, each circuit has its own rules regarding which cases are eligible for its mediation program. All of the programs require that parties must be represented by counsel to be eligible for selection. The programs also exclude appeals involving criminal issues (for example, motions to vacate sentences under 28 U.S.C. § 2255) and prisoner cases (for example, habeas corpus petitions). From the pool of fully counseled, civil cases, the majority of programs also exclude original petitions and appeals involving unresolved jurisdictional issues. Some programs also exclude immigration, Social Security issues, and tax cases.⁵⁶

⁵² *Id.* (“In at least one court, the costs for teleconferences are typically borne by the party initiating the call.”).

⁵³ See MCKENNA ET AL., *supra* note 1. By its terms, Federal Rule of Appellate Procedure 33 allows courts to delegate their authority to conduct settlement conferences to “other person[s] designated by the court for that purpose.” See also FED. R. APP. P. 33 Advisory Committee Note on the 1994 Amendment (“The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences.”). The mediation programs and their attorney-mediators “are delegates of the court and the judges thereof, [and] any orders or other communications issued by the [mediation program office] should be treated as if they had been issued by the court itself.” *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 425 (10th Cir. 1996).

⁵⁴ See MCKENNA ET AL., *supra* note 1, at 26–32 tbl.17; Niemic, *supra* note 15, at 15.

⁵⁵ See MCKENNA ET AL., *supra* note 1, at 26–32 tbl.17; Ganzfried, *supra* note 16. Under a pilot program initiated by the Second Circuit in July 2000, instead of participating in the CAMP program, parties can agree to participate in a mediation conducted by a mediator selected by the parties from a court roster. See Justin Kelly, *Second Circuit Appeals Court Launches New Mediation Pilot Program* (July 5, 2000), at http://www.adrworld.com/open_document.asp?Doc=xpSmGvfJg68code=WzUqOcy.

⁵⁶ See MCKENNA ET AL., *supra* note 1, at 26–32 tbl.17.

b) *Assignment*

The programs are similar regarding how eligible cases are selected for participation. After eligible cases have been referred to the program by the clerk's office, the vast majority of circuit programs conduct some form of substantive screening before scheduling a mediation. Some of the programs conduct more extensive reviews than others.⁵⁷ After such a review, the programs generally schedule mediations in as many cases as court resources permit.⁵⁸

In addition to cases being scheduled for mediation based on a review by staff counsel, mediations also are scheduled when counsel makes such a request, or the hearing panel makes a referral.⁵⁹

4. *Mandatory Participation Features*

Once a case is scheduled for mediation, participation generally is mandatory in all the programs, with the exception of the Eighth Circuit.⁶⁰ Removal of a case upon request for a compelling reason is feasible, although

⁵⁷ See *infra* pp. 425–30 app.

⁵⁸ See *id.* In the Eleventh Circuit, the Circuit Mediation Office reviews all eligible cases and selects a cross-section for mediation.

⁵⁹ See *infra* pp. 425–30 app.

⁶⁰ See MCKENNA ET AL., *supra* note 1, at 26–32 tbl.17. The Eighth Circuit requires all parties to consent to participate. See *id.* Whether a program is mandatory or voluntary has an impact on some of the potential benefits. In the court-related context, some empirical information suggests that while mandatory non-binding civil ADR programs result in higher rates of participation and thereby provide a greater opportunity for litigants to learn the value of ADR through participation, they also result in lower resolution and satisfaction rates than voluntary programs. See TASK FORCE ON THE QUALITY OF JUSTICE SUBCOMM. ON ALTERNATIVE DISPUTE RESOLUTION, JUDICIAL COUNCIL OF CAL., ALTERNATIVE DISPUTE RESOLUTION IN CIVIL CASES vi (1999). At an August 2000 Ninth Circuit Judicial Conference, 79.2% of the judges and lawyers attending an ADR program responded that it is

appropriate for a judge to order the parties to participate in a non-binding ADR process (other than a settlement conference) over a party's objection; and 90.4% responded that they had seen cases where an ADR process helped to produce a settlement even though one or more of the parties initially resisted or was reluctant to use ADR.

Hon. Dorothy W. Nelson, *ADR in the New Era*, CPR INST. FOR DISPUTE RESOLUTION, INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR, 65, 66–67 (2001). Moreover, “[w]hen asked whether judges should raise the issue of ADR the initial case management conference if no party raised the issue, 96.3% said yes.” *Id.* at 66.

not encouraged.⁶¹ Failure to appear at a scheduled mediation conference can result in sanctions.⁶²

Among the rationale for mandatory participation is that absent a court mandate to participate, counsel tend not to discuss settlement at the appellate level.⁶³ If the programs were voluntary, it is contended, substantially fewer cases would be settled or otherwise benefit from mediation. Moreover, in some instances counsel may feel that mediation is appropriate, however, their clients are reluctant to participate. The court's authority to mandate mediation places the responsibility for initiating the process on the court.⁶⁴

In most court programs, attendance of counsel is required. For the majority of programs, a client's attendance is not required unless the mediator specifically requires it.⁶⁵ However, several programs do require clients with full settlement authority to attend or be available by telephone.⁶⁶

⁶¹ See NIEMIC, *supra* note 1, at 9; Irvine, *supra* note 36 (stating that, in the Eleventh Circuit Mediation Program, "[i]f there is a compelling reason that mediation would not be appropriate, the lawyer is free to call the circuit mediator and explore those concerns."). See MCKENNA, *supra* note 1, at 26–32 tbl.17.

⁶² See 6TH CIR. L.R. 33(e) ("Upon failure of a party or attorney to comply with the provisions of this rule or a pre-argument conference order, this Court may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; or dismiss the appeal."); 10th CIR. L.R. 33.1(H) ("The court may impose sanctions if counsel or a party violates this rule or an order entered under it."); 11th CIR. L.R. 33–1(f) ("Upon failure of a party or attorney to comply with the provisions of this rule. . . the court may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; dismiss the appeal; or take such other appropriate action as the circumstances may warrant."); *San Ildefonso v. Ridlon*, 90 F.3d 423, 425 (10th Cir. 1996) (imposing sanctions on counsel for failure to participate in court-ordered mediation as authorized by local rule); United States Court of Appeals for the District of Columbia Circuit [Revised] Order Establishing Appellate Mediation Program, effective April 14, 1998 ("Failure of counsel to attend sessions may result in the imposition of sanctions.").

⁶³ See *supra* Part II.B.1.

⁶⁴ CAL. TASK FORCE ON APPELLATE MEDIATION, *supra* note 29, available at <http://www.courtinfo.ca.gov/reference/documents/mediation.pdf>.

⁶⁵ MCKENNA, *supra* note 1, at 26–32 tbl.17.

⁶⁶ See *infra* pp. 425–30 app. (outlining procedures of the Third Circuit Appellate Mediation Program, Seventh Circuit Settlement Conference Program, Eighth Circuit Settlement Program).

C. Settlement Focus

Appellate mediation programs exist primarily to promote and expedite settlements of pending appeals and any related cases.⁶⁷ The savings that

⁶⁷ See, e.g., 9TH CIR. L.R. 33-1 ("The primary purpose of a pre-hearing conference shall be to explore settlement of the dispute that gave rise to the appeal."); 10TH CIR. L.R. 33.1(A) ("The primary purpose of a conference is to explore settlement. . ."); U.S. Court of Appeals for the Fifth Circuit General Order Governing the Appellate Conference Program (Mar. 27, 2000) ("The principal purpose of the conference program is to explore the possibility of settlement and to facilitate settlement discussions."); U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *supra* note 28, at 1 ("The Appellate Mediation Program uses mediation to achieve settlement of cases."); Irvine, *supra* note 45, at B10 ("[E]very circuit court of appeals except the Federal Circuit has formally established a settlement program to help parties resolve their cases while pending appeal."); Kaufman, *Must Every Appeal*, *supra* note 25, at 758-61 (noting the encouragement of settlement is an important aspect of the program); Niemic, *supra* note 15, at 13; MCKENNA ET AL., *supra* note 1, at 26-32 tbl.17 (reporting all of the regional courts of appeals have some form of appellate mediation or conference program to resolve some appeals by settlement with little or no judicial intervention); *id.* at 42-43 (describing the D.C. appellate mediation program, "The role of the mediators is to help parties reach a settlement or, at a minimum, to help parties resolve some issues in their case"); *id.* at 58 (describing the First Circuit, "The court's [Civil Appeals Management] Program . . . attempts to settle cases before briefing without court action, by encouraging and facilitating settlement of meritorious appeals and the withdrawal of meritless appeals."); *id.* at 70 (describing the Second Circuit's Civil Appeals Management Program, "The focus of the program is on settling cases . . ."); *id.* at 84 (describing the Third Circuit, "The court's appellate mediation program was designed to conserve judicial and party resources by facilitating settlement . . ."); *id.* at 98 (noting the Fourth Circuit's Office of the Circuit Mediator "provides settlement assistance to reduce the caseload of the judges of the circuit, save taxpayer money, and save the time and money of litigants and their counsel"); *id.* at 110 (noting the Fifth Circuit's Appellate Conference Program, "The [conference] attorneys conduct settlement conferences in civil cases selected by them . . ."); *id.* at 123 (stating that the Sixth Circuit's Office of the Circuit Mediator "schedules pre-argument conferences to facilitate settlement"); *id.* at 134 (noting of the Seventh Circuit's Settlement Conference Program, "The court has a settlement conference program to encourage and facilitate the settlement of civil appeals."); *id.* at 150 (stating that the Eighth Circuit's Settlement Program "[is] designed to help the parties achieve a consensual resolution and to limit or clarify issues on appeal."); *id.* at 164 (stating that in the Ninth Circuit's Mediation Program, "[t]he court attempts to settle civil cases by referring them to the circuit mediation program."); *id.* at 179 (stating the Tenth Circuit's Mediation Office "explores settlement possibilities. . ."); *id.* at 192 (stating the Eleventh Circuit's Mediation Office "helps to explore possibilities for voluntary settlement. . ."); Posted Job Description for Circuit Mediators in Eleventh Circuit (Mar. 6, 2001) (on file with author) ("The [Circuit Mediators] will preside at mediations in civil appeals. The primary purpose of the mediation is to settle appeals and any related cases."); Posted Job Description for Circuit

result for both the courts and the parties by settling an appeal provide a compelling efficiency rationale for the continued existence and growth of the programs.⁶⁸ Attorneys attending an appellate settlement conference must obtain from their clients “as much authority as feasible to settle the case” pursuant to Rule 33.⁶⁹ Individual rules for court conference programs reinforce this requirement.⁷⁰

Mediators in Tenth Circuit (Apr. 24, 2001) (on file with author) (“The [Circuit Mediators] will preside at mediation conferences in civil appeals. The primary purpose of the conference is to settle appeals and any related cases.”). The Internet address for the Seventh Circuit’s Settlement Conference Program under Rule 33 is http://www.ca7.uscourts.gov/conf_aty (last visited Jan. 18, 2002). These appellate programs also address procedural and case management issues, assist parties clarify issues, and resolve procedural matters without the necessity of motion practice. See MCKENNA ET AL., *supra* note 1, at 26–32 tbl.17.

⁶⁸ See *supra* Part II.A.

⁶⁹ FED. R. APP. P. 33.

⁷⁰ See NIEMIC, *supra* note 1, at 21 (stating of the First Circuit, “[g]enerally, the attorneys in charge of the appeals are required to attend the conference and must have appropriate settlement authority to settle or otherwise dispose of the appeal.”); *id.* at 27–28 (stating of the Second Circuit, “[a]ttorneys are to participate in good faith, with a view to resolving differences and are to obtain advance authority from their clients to make such commitments as reasonably may be anticipated.”); *id.* at 35 (stating that Third Circuit Local Rule 33.5(b) requires that “[m]ediation sessions must be attended by the senior lawyer responsible for each side of the appeal or another person with actual authority to negotiate a settlement of the case”); *id.* at 43 (noting of the Fourth Circuit, “Counsel are expected to attend with authority to initiate and respond to settlement proposals, but conference attorneys do not necessarily expect counsel to have absolute settlement authority”); *id.* at 55 (noting of the Sixth Circuit, “Counsel are expected to come with authority to make and respond to settlement proposals”); *id.* at 60 (noting of the Seventh Circuit, “[w]hether to settle is the parties’ decision, but good faith participation in the settlement process is required.”); *id.* at 68 (stating of the Eighth Circuit, “[i]n most situations the client, or client representative with discretionary settlement authority, is present for in-person conferences and for joint teleconferences.”); *id.* at 76 (stating relative to the Ninth Circuit, “For in-person mediations, parties must have present at the mediation an individual who is fully informed and vested with full settlement authority. For teleconferenced mediation, if the person representing a party does not have authority to make and respond to settlement proposals, someone with authority must be readily available”); *id.* at 84 (noting of the Tenth Circuit, “[b]efore the conference, lead counsel must obtain the broadest feasible authority to settle the appeal.”); *id.* at 90 (The Eleventh Circuit “requires lead counsel to obtain advance authority from their clients to make such commitments at the conference as reasonably may be anticipated.”); *id.* at 97–98 (noting that the D.C. Circuit requires attendance at mediation sessions by each party’s counsel or another person with actual authority to enter into a settlement agreement during the session).

Moreover, a few programs explicitly require good faith participation in their local rules.⁷¹ However, the exact boundaries of good faith are unclear⁷² and largely untested in appellate programs.⁷³

⁷¹ See NIEMIC, *supra* note 1, at 27–28 (Second Circuit “attorneys are to participate in good faith, with a view to resolving differences, and are to obtain advance authority from their clients to make such commitments as reasonably may be anticipated.”); *id.* at 60 (noting relative to the Seventh Circuit that “whether to settle is the parties’ decision, but good faith participation in the settlement process is required”). See also *U.S. v. Sweeney*, 52 F. Supp. 2d 164, 166 (D. Mass. 1999) (involving parties who were ordered to attend mediation by First Circuit; the mediator issued an order that provided that parties “participate in mediation in good faith”).

⁷² See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997); Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 552–53 (1997); David S. Winston, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water . . .”*, 11 OHIO ST. J. ON DISP. RESOL. 187, 189 (1996); Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure To Participate in Good Faith in, or Comply with Agreement Made in Mediation*, 43 A.L.R. 5th 545, 566–67 (2001).

⁷³ Inconsistent case law involving sanctions relating to the good faith participation of parties in a court-ordered mediation has been evolving at the lower court levels. See, e.g., *Nick v. Morgan’s Foods, Inc.*, 99 F. Supp. 2d 1056, 1057 (E.D. Mo. 2000), *aff’d*, 270 F.3d 590 (8th Cir. 2001) (imposing sanctions based on defendant’s failure to submit the required mediation memorandum and failure to send a corporate representative with settlement authority after agreeing to participate in mediation); *Raad v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003 (D. Neb. 1998) (awarding sanctions awarded for defendant’s refusal to participate in mediation); *Foxgate Homeowners’ Ass’n v. Bramalea Cal. Inc.*, 92 Cal. Rptr. 2d 916 (Cal. Ct. App. 2000) (imposing sanctions arising out of failure to participate in mediation process in good faith sent back for reassessment based on mediator’s report), *rev’d*, 25 P.3d 1117, 1119 (Cal. 2001) (finding no exceptions to confidentiality of communications by mediator to justify sanctions award, a mediator may not report to the court about the conduct of participants in a mediation); *In re Acceptance Ins. Co., Relator*, 33 S.W.3d 443, 454 (Tex. App. 2000) (voiding mediation orders directing parties to make a good faith effort to settle); *Decker v. Lindsay*, 824 S.W.2d 247, 252 (Tex. App. 1992) (vacating portions of court order requiring parties to participate in mediation proceedings in good faith with the intention of settling).

III. DISJUNCTION BETWEEN VACATUR CASE LAW AND APPELLATE MEDIATION PROGRAMS

A. *The Vacatur Debate*

1. *Background*

During the appellate phase, a significant number of cases settle.⁷⁴ Whether the judgment being appealed remains intact is one of the complexities of settling during this stage. In some instances, the losing party is concerned about the collateral consequences of the adverse judgment or decision. For example, a decision may contain certain findings of fact that impute a party's reputation.⁷⁵ Or, the losing party may be concerned about the use of an adverse judgment in future litigation under the doctrines of res judicata or collateral estoppel. In a settlement context, collateral estoppel poses the greater concerns for settling parties because of the involvement of non-parties.

Under the doctrine of collateral estoppel—also known as issue preclusion—non-parties may be able to rely upon a prior judgment obtained against a party in an action that the parties settled. In analyzing collateral estoppel, courts and commentators have routinely drawn a distinction between offensive and defensive use. Defensive collateral estoppel occurs when a defendant attempts to preclude a plaintiff from litigating an issue that the plaintiff has previously litigated unsuccessfully against another party. Offensive use occurs when a plaintiff seeks to prevent the defendant from litigating an issue that the defendant has previously litigated and lost in an action with another party.⁷⁶ By contrast, under the doctrine of res judicata—also known as claim preclusion—the preclusive effects of a prior judgment are limited to litigants who were actually parties to the litigation and their privies.⁷⁷ A prior judgment bars all future claims only between the litigating parties that arise out of the same transaction.⁷⁸

When settling cases that involve judgments on appeal, persons likely to be parties in future litigations often are concerned about the res judicata and

⁷⁴ See *supra* notes 3, 29.

⁷⁵ See *Barry v. Atkinson*, 193 F.R.D. 197, 199 (S.D.N.Y. 2000).

⁷⁶ See *Fisch*, *supra* note 3, at 614; Michael D. Green, *The Inability of Offensive Collateral Estoppel To Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 150–52 (1984).

⁷⁷ See RESTATEMENT (SECOND) OF JUDGMENTS §§ 39–42 (1982).

⁷⁸ See *id.* § 24(1).

collateral estoppel effects of any adverse judgment.⁷⁹ Indeed, it has been aptly observed that “[a]lthough a rule of judicial procedure, preclusion doctrine makes itself heard primarily outside the courtroom.”⁸⁰ Res judicata concerns can be addressed in most instances within the context of a settlement agreement. Collateral estoppel cannot be so contained. Collateral estoppel concerns are critical in the settlement of certain types of disputes. For example, issue preclusion often occupies a central role in the settlement of patent and trademark cases.⁸¹

To remove the ability of non-parties collaterally to use a judgment from a settled case, vacatur provides the most certainty. Vacatur removes a judgment from the record books and prevents any collateral estoppel (as well as res judicata) consequences from occurring.⁸² However, unlike other

⁷⁹ For a discussion of the different incentives facing repeat litigants as compared to one-time litigants, see Robert Scott Lewis, Recent Decision, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership: *Settlement Conditioned on Vacatur?*, 47 ALA. L. REV. 883, 884 (1996); Daniel Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CAL. L. REV. 867, 885–90 (1997); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 131 (1995). See also Mark R. Kravitz, *Appellate Law, Settling Cases*, NAT’L L.J., Apr. 26, 1999, at B17.

⁸⁰ Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21, 51.

⁸¹ See, e.g., *Aqua Marine Supply v. Aim Machining, Inc.*, 247 F.3d 1216, 1218 (Fed. Cir. 2001) (citing fact that settlement provided for vacatur of district court judgment invalidating patent); *Nestle Co., v. Chester’s Mkt., Inc.*, 756 F.2d 280, 281 (2d Cir. 1985) (stating Nestle insisted on vacatur of district court’s judgment invalidating its trademark “Toll House” as a condition of settlement so that the judgment would not automatically prevent it through the operation of collateral estoppel from enforcing the trademark in the future); *Allen-Bradley Co. v. Kollmorgen Corp.*, 199 F.R.D. 316, 317 (E.D. Wis. 2001) (stating a settlement reached at district court level conditioned upon the court vacating its patent claim construction order).

⁸² If a court orders vacatur of the judgment on appeal, its preclusive effect is typically eliminated. See *Russman v. The Board of Educ.*, 260 F.3d 114, 121 (2d Cir. 2001) (“We must now decide whether to vacate the district court’s judgment and thereby effectively deny its res judicata and precedential consequences.”); *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138, 1146 (2d Cir. 1992) (holding that a vacated judgment has no preclusive effect), *aff’d*, 510 U.S. 86 (1993); *Pontarelli Limousine, Inc. v. Chi.*, 929 F.2d 339, 340–41 (7th Cir. 1991); *Doddrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985); *Zeneca, Ltd. v. Novapharm Ltd.*, 919 F. Supp. 193, 196 (D. Md. 1996) (“As a general rule, a vacated judgment and the factual findings underlying it have no preclusive effect; the judgment is a legal nullity.”), *aff’d*, 111 F.3d 144 (Fed. Cir. 1997); *Chandler v. Sys. Council U-19, No. CV85-AR-1948-S*, 1986 U.S. Dist. LEXIS 18832, at *6 (N.D. Ala. Oct. 20, 1986) (“A decision which is vacated has no precedential value, and for all intents and purposes never existed.”). See also 1B JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.416[2] (2d ed. 1993); 13A WRIGHT ET AL.,

aspects of a settlement agreement, the parties cannot privately stipulate to vacate a judgment. Vacatur is an equitable remedy that falls within a court's discretionary powers.⁸³ By statute, the Supreme Court and federal appellate courts are empowered to vacate their own judgments and judgments of a lower court.⁸⁴ Moreover, appellate courts are authorized under Rule 33 of the Federal Rules of Appellate Procedure to enter orders "implementing any settlement agreement,"⁸⁵ although the Rule and its accompanying Advisory Note are silent regarding how a court should implement a settlement agreement that provides for vacatur of a judgment on appeal. Federal district courts are empowered to vacate their own decisions pursuant to Federal Rule of Civil Procedure 60(b).⁸⁶

In sum, vacatur can be a powerful settlement tool. Herein lies the fuel of the vacatur debate: under what circumstances should courts grant such a potent form of relief to assist settlement?

2. Positions Within Debate

It is not my intent, nor is it necessary for this Article, to discuss in depth the full range of views within the active debate of the role of courts in settlement.⁸⁷ For purposes here, a brief summary will be provided of a portion of this debate that focuses on whether post-judgment vacatur to assist settlement is an appropriate remedy for courts to grant.

Two primary positions can be identified within the debate involving vacatur and settlement. One views litigation chiefly as a public, rather than private, event. Scholars and judges working within this framework contend that courts must first and foremost consider the public impact of vacating

FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3533.10 (Supp. 2001). *But see* Chemetron Corp. v. Bus. Funds, Inc., 682 F.2d 1149, 1190 (5th Cir. 1982) (holding that a defendant could be collaterally estopped from relitigating facts which have been decided adversely in a prior case even though factual findings in prior case set aside by trial judge when case was dismissed as a result of settlement), *vacated on other grounds*, 460 U.S. 1007 (1983).

⁸³ See *infra* Parts III.B–III.D.

⁸⁴ 28 U.S.C. § 2106 (1994).

⁸⁵ FED. R. APP. P. 33.

⁸⁶ Rule 60(b) permits a court to relieve a party from an adverse judgment on grounds which include fraud, mistake, newly discovered evidence, and satisfaction of judgment. The Rule also includes a catch-all provision that allows relief from a judgment for "any other reasons justifying relief from the operation of the judgment." A litigant may also bring a motion to vacate under Rule 59(e), which permits motions to alter or amend a judgment. FED. R. CIV. P. 59(e), 60(b).

⁸⁷ See *supra* note 6.

any judicial decision. They contend that the very purpose and integrity of the judicial system is at stake when courts vacate decisions to assist settlements.⁸⁸ More specifically, under a common law system where significant reliance is placed on prior cases for establishing and articulating the society's rule of law, vacatur to assist private settlements seriously undermines the legal system itself by tampering with precedent. As articulated by one court:

When a clash between genuine adversaries produces a precedent . . . the judicial system ought not to allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.⁸⁹

The other view sees litigation primarily as a private event between the parties and not a public one. The primary function of litigation is viewed as the resolution of private disputes and, as such, the private interests of the litigants in resolving their dispute should be paramount.⁹⁰ If courts deny a vacatur request needed to effectuate a settlement, the litigants are forced to assume the role of "private attorneys general."⁹¹ Such a denial compels the parties to litigate on behalf of the public interest, rather than in pursuit of their private goals and distorts the purpose of the legal system, including the creation of reliable precedent.

B. U.S. Supreme Court's "Exceptional Circumstances" Standard

The United States Supreme Court has addressed the issue of vacatur in the context of settlement by highlighting the non-prevailing party's role in

⁸⁸ See Luban, *supra* note 6, at 2622–26; Resnick, *Whose Judgment?*, *supra* note 6, at 1501–04. See generally Fisch, *supra* note 3; Steven R. Harmon, Comment, *Unsettling Settlements: Should Stipulated Reversals Be Allowed to Trump Judgments' Collateral Estoppel Effects Under Neary?*, 85 CAL. L. REV. 479, 521–26 (1997).

⁸⁹ *In re Mem'l Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988).

⁹⁰ See Fisch, *supra* note 3, at 621–24; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985); Menkel-Meadow, *supra* note 6, at 2669–70. See also Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1204 (2000).

⁹¹ See *Nestle Co. v. Chester's Mkts., Inc.*, 756 F.2d 280, 284 (discounting public interest involved in vacatur decision, court found "no justification to force these defendants, who wish only to settle the present litigation, to act as unwilling private attorneys general and to bear the various costs and risks of litigation").

requiring such relief and stressing the importance of an orderly judicial process. The most recent standard articulated by the U.S. Supreme Court is set forth in *Bonner Mall*,⁹² in which the Court held that when an appeal becomes moot because of settlement, the resulting dismissal or withdrawal does not justify vacatur, absent "exceptional circumstances."⁹³

The procedural and factual history of *Bonner Mall* is particularly unique. The petitioner, Bancorp, held a mortgage on certain properties owned by Bonner Mall, which had filed for bankruptcy. Bancorp had successfully petitioned the bankruptcy court to suspend the automatic stay of foreclosure sale against Bonner Mall, which Bonner Mall appealed.⁹⁴ On appeal, the district court reversed the decision, which Bancorp then appealed to the Ninth Circuit. The Ninth Circuit affirmed the district court and Bancorp petitioned for a writ of certiorari.⁹⁵ After the U.S. Supreme Court granted certiorari and received the parties' briefs on the merits, the parties stipulated to a consensual plan of reorganization, which the bankruptcy court approved. The parties agreed that their settlement "mooted the case," including the pending appeal before the Court.⁹⁶ Bancorp filed a motion with the Court requesting that it vacate the Ninth Circuit's judgment under 28 U.S.C. § 2106, which allows an appellate court to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" on appeal.⁹⁷ Bonner Mall opposed the motion to vacate.⁹⁸ The Court "set the vacatur question for briefing and argument."⁹⁹

The precise issue addressed in *Bonner Mall* was whether federal appellate courts should vacate civil judgments of lower courts in cases that are settled after an appeal is filed or certiorari sought.¹⁰⁰ Two concerns drove the Court's analysis. The first was whether a party had voluntarily abandoned its right to review.¹⁰¹ The second was whether the public interest would be served or compromised by vacatur under the circumstances.

The Court stressed that to "allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral

⁹² U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

⁹³ *Id.*

⁹⁴ *Id.* at 20.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 28 U.S.C. § 2106 (1994).

⁹⁸ *Bonner Mall*, 513 U.S. at 20.

⁹⁹ See also Resnick, *Whose Judgment?*, *supra* note 6, at 1481-82.

¹⁰⁰ *Bonner Mall*, 513 U.S. at 19.

¹⁰¹ *Id.* at 25.

attack on the judgment would—quite apart from the considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.”¹⁰² The Court emphasized that judicial decisions “are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur.”¹⁰³ A vacatur order can be neither purchased nor parleyed by the parties. To provide otherwise would disrupt the orderly functioning of the judicial system and its development of precedent.

The Court further reasoned,

[W]hile the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may *deter* settlement at an earlier stage. *Some* litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. And the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal. We find it quite impossible to assess the effect of our holding, either way, upon the frequency or systemic value of settlement.¹⁰⁴

The Court ended its analysis with an open-ended qualification: “This is not to say that vacatur can never be granted when mootness is produced in that fashion. . . . Exceptional circumstances may conceivably counsel in favor of such a course.”¹⁰⁵

Prior to *Bonner Mall*, the Court’s leading case on vacatur was *United States v. Munsingwear, Inc.*¹⁰⁶ In *Munsingwear*, the United States sought a holding from the Supreme Court that the doctrine of res judicata did not apply to a second and later lawsuit between the United States and Munsingwear. The first lawsuit, which alleged violations of price-fixing regulations, had been litigated only as to injunctive relief in Munsingwear’s favor.¹⁰⁷ Although the government appealed the decision while the appeal was pending, the relevant commodity was deregulated for the time period at issue in the first lawsuit. Munsingwear moved for dismissal of the appeal on

¹⁰² *Id.* at 27.

¹⁰³ *Id.* at 26–27 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

¹⁰⁴ *Id.* at 27–28.

¹⁰⁵ *Id.* at 29.

¹⁰⁶ *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

¹⁰⁷ *Id.* at 37.

the grounds of mootness, which was granted.¹⁰⁸ When the United States later commenced a second lawsuit involving the same commodity that covered a later time period, Munsingwear moved to dismiss the action under the doctrine of *res judicata*. The United States opposed the motion by arguing that the prior decision was not binding under the doctrine of *res judicata* because during the pendency of the appeal of that decision, the issue had become moot because of a change in regulations.¹⁰⁹

The Supreme Court disagreed. The Court found that the United States never attempted to preserve its rights by moving for vacatur of the prior decision and thus “having slept on its rights,”¹¹⁰ could not now complain. However, the Court importantly noted that when a party was prevented from obtaining appellate review through no fault of its own—characterized by the Court as “happenstance,”—*res judicata* should not apply because it would result in unfair prejudice.¹¹¹

In sum, party conduct is a critical component in *Bonner Mall* and its predecessor when deciding whether vacatur is appropriate. *Bonner Mall* also stresses the broader concerns of public interest and the orderly operation of the judicial system in its analysis.

C. Circuit Case Law on Vacatur and Lack of Consideration of Programs

Despite the particularly unique factual circumstances of *Bonner Mall*—the request for vacatur of a circuit court judgment (as opposed to a district court judgment) and opposition to vacatur by one of the settling parties—circuit courts have not viewed its holding within the case’s narrow factual confines. Instead, courts have applied the *Bonner Mall* prong focused on party conduct rigidly to all types of vacatur requests made to assist settlement, including those jointly made by the settling parties for district court judgments on appeal.¹¹² Applying the *Bonner Mall* “exceptional circumstances” standard, the vast majority of circuit courts deny vacatur

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 41.

¹¹¹ *Id.* at 40.

¹¹² The *Bonner Mall* rule is especially broad, and has been criticized on this basis. *See* 13A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d (2d ed. 1984).

requests to assist settlement.¹¹³ For the majority of circuits, "exceptional circumstances" does not include assisting a settlement, regardless of whether

¹¹³ See *Aqua Marine Supply v. Aim Machining, Inc.*, 247 F.3d 1216, 1221 (Fed. Cir. 2001) (stating vacatur not appropriate because losing party's own actions resulted in appeal being mooted, even though settlement agreement provided for joint proposed vacatur order to be submitted to district court which court declined); *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 296 (3d Cir. 2001) ("Because mootness by reason of a settlement is a result of the voluntary actions of the party, it does not justify vacatur of a federal civil judgment under review."); *Amoco Oil Co. v. EPA*, 231 F.3d 694, 700 (10th Cir. 2000) (denying request for vacatur because appeal was rendered moot by settlement between the parties rather than unilateral action of appellee); *Van Eeton v. Beebe*, No. 99-35470, 2000 U.S. App. LEXIS 22741, at *3 (9th Cir. Sept. 7, 2000) (denying vacatur request, appeal did not become moot due to circumstances unattributable to appellant or other parties); *In re W. Pac. Airlines, Inc.*, 181 F.3d 1191, 1197-98 (10th Cir. 1999) (denying request for vacatur because appellants voluntarily contributed to the mootness of the appeal); *Goldin v. Bartholow*, 166 F.3d 710, 719 (5th Cir. 1999) ("If mootness can be traced to actions of the party seeking vacatur, the decision of the lower court will usually be allowed to stand."); *GST Tucson Lightwave, Inc. v. Tucson*, No. 97-15328, 1998 U.S. App. LEXIS 1498, at *9-10 (9th Cir. Feb. 2, 1998) (dismissing appeal and denying vacatur); *Philips Elec. N. Am. Corp. v. Sears Roebuck & Co.*, No. 96-1426, 1997 U.S. App. LEXIS 28826, at *1 (Fed. Cir. Sept. 30, 1997) (dismissing appeal and denying vacatur after appellant moved to vacate order of district court and to voluntarily dismiss appeal as moot by virtue of settlement agreement with appellee); *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, No. 93-3251, 1996 U.S. App. LEXIS 6515, at *2 (7th Cir. Mar. 21, 1996) (On remand from reversal of appellate court decision by U.S. Supreme Court, the parties submitted a Rule 54 statement informing the court that they had entered into a settlement agreement. They jointly asked the appellate court to remand to the district court with instructions to vacate its opinion and judgment order and to dismiss the suit. Citing *Bonner Mall*, the court stated that "We are not at liberty to enforce the parties' agreement as to vacatur, . . . but we order the case dismissed pursuant to their mutual request and Fed. R. App. P. 42(b)."); *Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 41 F.3d 1221, 1222 (8th Cir. 1994) (holding no "exceptional circumstances" present to vacate, and dismissing as moot the parties joint request for vacatur of the district court judgment and dismissal of appeal because of settlement). See also *Mahoney v. Babbitt*, 113 F.3d 219, 221 (D.C. Cir. 1997) (fitting squarely within *Bonner Mall* vacatur analysis of voluntary abandonment and vacatur not appropriate, because losing party elected not to appeal emergency order); *19 Solid Waste Dep't Mech. v. Albuquerque*, 76 F.3d 1142, 1144 (10th Cir. 1996) (denying city's request for vacatur because city rendered case moot by voluntarily withdrawing the policy invalidated by the district court); *Cobb Publ'g, Inc. v. Hearst Corp.*, No. 95-2033, 1996 U.S. App. LEXIS 16656, at *1-3 (6th Cir. June 17, 1996) (dismissing appeal and denying defendant-appellant's request for vacatur after interlocutory disqualification order appealed, underlying case settled and as part of settlement agreement, plaintiffs-appellees agreed not to participate in the appeal); *Lewis*, *supra* note 79, at 891.

dismissal of the appeal is contingent upon vacatur or not.¹¹⁴ These courts maintain that the equitable remedy of vacatur should only be granted to parties who are precluded from appealing a decision because of events outside their control.¹¹⁵ Indeed, it is viewed as an abuse of judicial power to grant vacatur when a party knowingly foregoes its right to appeal because of settlement. Vacatur to assist settlements “condone[s] wasteful utilization of the court’s resources and encourage[s] future litigants to hedge their bets by postponing settlement until after learning of the opinion of the court.”¹¹⁶

The Second Circuit, however, espouses an arguably broader view of *Bonner Mall* in some circumstances. In *Microsoft Corp. v. Bristol Technology, Inc.*,¹¹⁷ Microsoft filed a notice of appeal and soon thereafter the parties reached a settlement. However, “[t]he settlement agreement was entered [into] with the understanding that Bristol would not oppose Microsoft’s motion for vacatur of the district court’s order on punitive and injunctive relief.”¹¹⁸ The Second Circuit panel observed that the prior practice in the circuit “ha[d] been to vacate district court judgments when a settlement moots the controversy.”¹¹⁹ However, the court stated that the *Bonner Mall* decision “raised the bar appreciably” when the Supreme Court ruled that mootness by settlement is insufficient to overcome opposing considerations, which included the benefits society derive from “the resolution of legal questions through orderly procedures.”¹²⁰

Working within the language of *Bonner Mall* and its “exceptional circumstances” standard, the court reviewed prior Second Circuit decisions

¹¹⁴ See *supra* note 113. See also *Woodland v. Houston*, No. 96–20358, 1996 U.S. App. LEXIS 34395 (5th Cir. Aug. 21, 1996) (without articulating the exceptional circumstances, court granted appellant’s motion to vacatur, stating, “We are persuaded that the circumstances are here exceptional, apart from the agreement to vacate, which alone would not be sufficient”).

¹¹⁵ See e.g., *Amoco*, 231 F.3d at 698. See also *U.S. v. Jenks*, 129 F.3d 1348, 1352 (10th Cir. 1997) (vacating district court judgment because prevailing party’s unilateral action rendered case moot); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995) (granting vacatur because change in law caused mootness). But see *McClendon v. Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996) (granting request for vacatur of judgment even though government’s own remedial measures mooted its appeal because the actions deemed not a manipulation of the judicial process).

¹¹⁶ *Austin v. Ford*, 181 F.R.D. 283, 286 (S.D.N.Y. 1998) (citing relevant Supreme Court and Second Circuit cases).

¹¹⁷ *Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 154 (2d Cir. 2001).

¹¹⁸ *Id.* at 153–54.

¹¹⁹ *Id.* at 154 (citing *Nestle Co., Inc. v. Chester’s Mkt., Inc.*, 756 F.2d 280, 283 (2d Cir. 1985)).

¹²⁰ *Id.*

where vacatur was granted and concluded that, "the exceptional circumstances had to do with the facilitation of settlements that would obviate pending appeals."¹²¹ The Second Circuit is in the minority by reading *Bonner Mall* in this fashion. Moreover, in *Bristol* the pending appeal was already obviated by the settlement. However, the court nonetheless granted vacatur for another reason not articulated in *Bonner Mall*—the correctness of the lower court decision. In *Bristol*, it was "unclear" whether the district court had the power to reach the punitive damages issue.¹²²

When evaluating a vacatur request under either a narrow or broad reading of *Bonner Mall*, party participation in appellate mediation programs only has been mentioned on rare occasions. In *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*,¹²³ after losing a preliminary injunction motion, plaintiff-appellant Major League sought an injunction pending appeal from the Second Circuit.¹²⁴ During oral argument, the panel suggested that the parties attempt to negotiate a settlement and assigned court staff counsel to mediate their discussions.¹²⁵ At the end of the day, a

¹²¹ *Id.* at 154–55 (citing *Major League Baseball Prop., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149 (2d Cir. 1998); *Keller v. Mobil Corp.*, 55 F.3d 94 (2d Cir. 1995)).

¹²² *Id.* at 152. Another circuit opinion also factored into its exceptional circumstances determination the likelihood that the lower court was incorrect as well as the subject matter of the appeal. *See In re Gen. Motors Corp.*, No. 94–2435, 1995 U.S. App. LEXIS 41270, at *4–5 (4th Cir. Feb. 17, 1995) (vacating a district court discovery order requiring the production of attorney-client documents in a case that had been settled). The district court order in *General Motors* was on appeal before the Fourth Circuit on a writ of mandamus and after argument, the case was settled. The order was then used in another case to require the production of the same documents. The court in finding "exceptional circumstances" stated that "[w]hat is at issue here is a claim of privilege, a matter that should not be taken lightly," and the court concluded that the district court order was incorrect. Some sharp lawyering practice appeared to motivate the courts, as well. *Id.*

¹²³ *Major League Baseball Prop., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149 (2d Cir. 1998).

¹²⁴ *Id.* at 150. Appellant Major League Baseball brought a trademark infringement and unfair competition suit in the U.S. District Court for the Southern District of New York against Pacific Trading Cards, Inc. ("Pacific"), alleging that Pacific was manufacturing and distributing baseball trading cards depicting major league baseball players wearing Major League trademarked uniforms. *Id.* Major League had granted Pacific licenses to issue trading cards in past years with the understanding that Pacific could not use Major League's trademarks (here, the uniforms) without Major League's consent. *Id.* However, Major League refused to grant Pacific a license for its current set of cards. *Id.* To prevent the distribution of the alleged unauthorized cards, Major League requested a preliminary injunction from the district court. *Id.*

¹²⁵ *Id.* at 151.

settlement was reached, contingent upon vacatur of the district court decision. Without such a vacatur, Major League would be unable to settle because it would be subject to the defense of acquiescence in future trademark cases with other alleged infringers.¹²⁶ The Second Circuit found that "exceptional circumstances" existed and vacated the district court opinion.¹²⁷ The court explicitly mentioned its involvement in directing the parties into mediation when explaining its finding of exceptional circumstances.¹²⁸

Although decided prior to *Bonner Mall*, another case of note in connection with appellate mediation programs is also from the Second Circuit. In *Nestle Co. v. Chester's Market, Inc.*,¹²⁹ the parties settled the matter within the court's CAMP program.¹³⁰ The settlement provided for resolution of both the pending appeal and the other claims that remained pending in the district court. However, the settlement agreement was contingent upon the district court's vacatur of a partial summary judgment granted against the plaintiff on the defendant's trademark claim, which was being appealed. The district court denied the parties' motion to vacate,¹³¹ which, the Second Circuit reversed by finding that the trial court had "abused its discretion."¹³² In *Nestle*, the court concluded that the trial court's reliance on the public interest in finality of judgments was misplaced, and the importance of promoting settlement superseded any interest in finality.¹³³ The *Nestle* case is of note because critics have suggested that the "decision stemmed from the Second Circuit's desire to uphold a settlement, which had been arranged through the CAMP process and that the Second

¹²⁶ *Id.* at 152.

¹²⁷ *Id.* The court's order read in pertinent part, "[W]e find that exceptional circumstances exist and that it is equitable to order vacatur of the District Court opinion and judgment in light of our determination that these exceptional circumstances outweigh the considerations concerning the public interest or the administration of justice identified in [*Bonner Mall*]." *Id.*

¹²⁸ *Id.*, see *infra* Part V.A.

¹²⁹ *Nestle Co., Inc., v. Chester's Mkt. Inc.*, 756 F.2d 280 (2d Cir. 1985).

¹³⁰ See *supra* Part II.A.

¹³¹ *Nestle Co., Inc., v. Chester's Mkt., Inc.*, 596 F. Supp. 1445, 1445 (D. Conn. 1984), *rev'd*, 756 F.2d 280 (2d Cir. 1985).

¹³² *Nestle*, 756 F.2d at 280.

¹³³ *Id.*

Circuit's infatuation with the CAMP procedure motivated its decision more than the general goal of encouraging settlement."¹³⁴

D. District Court Vacatur Decisions and Lack of Discussion of Programs

In addition to circuit courts being able to vacate district court decisions on appeal, district courts also have the authority to vacate such judgments under Federal Rule of Civil Procedure 60(b).¹³⁵ Indeed, in *Bonner Mall* the U.S. Supreme Court stated that an appellate court could refer the vacatur issue to the lower court, instead of deciding the issue itself.¹³⁶ Many courts' mediation programs inform parties of this option.¹³⁷

When a judgment is on appeal, two procedural approaches exist to direct the vacatur request to the district court. One approach is for the circuit court to conditionally dismiss the appeal, which divests the circuit court of jurisdiction and remands the case to the lower court. The other available approach is under Rule 60(b), which does not require a conditional dismissal of the appeal; however, Rule 60(b) allows the district court to indicate whether or not it would grant the motion should the case be remanded.¹³⁸ If

¹³⁴ Fisch, *supra* note 3, at 603 n.76; See also Mary A. Donovan & Marya Lenn Yee, *Letting the Chips Fall: The Second Circuit's Decision on Toll House*, 52 BROOK. L. REV. 1029, 1030-31 (1986).

¹³⁵ FED. R. CIV. P. 60(b). A court can relieve a party from a final judgment or order for several enumerated reasons, including the satisfaction, release or discharge of a judgment, or for "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b). See also *Evans v. Mullins*, 130 F. Supp. 2d 774, 775 n.1 (W.D. Va. 2001).

¹³⁶ *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994). Even prior to *Bonner Mall*, the Ninth Circuit had adopted this practice. See *Nat'l Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 763 (9th Cir. 1989); *Ringsby Truck Lines, Inc., v. W. Conference of Teamsters*, 686 F.2d 720, 722-23 (9th Cir. 1982) (dismissing the case and allowing the district court to determine whether its decision should be vacated).

¹³⁷ Examples include the Second Circuit CAMP, Third Circuit Appellate Mediation Program, Fifth Circuit Appellate Conference Program, Sixth Circuit Mediation Conference Program, Seventh Circuit Settlement Conference Program, Ninth Circuit Settlement Program, Eleventh Circuit Mediation Office. Telephone interviews with circuit court mediators (Oct. 2, 2000-May 25, 2001) (notes on file with author). See also *Pressley Ridge Schs. v. Shimer*, 134 F.3d 1218, 1222 (4th Cir. 1998); *Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 41 F.3d 1221, 1222 (8th Cir. 1994).

¹³⁸ See *Toliver v. Co. of Sullivan*, 957 F.2d 47, 48 (2d Cir. 1992); *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965); *Ryan v. U.S. Lines Co.*, 303 F.2d 430,

a district court is inclined to grant the motion, it may issue a short memorandum so stating its inclination. The movant can then file a motion with the court of appeals asking for a limited remand of the pending appeal to obtain the vacatur decision from the district court.¹³⁹ Should the district court deny the motion,¹⁴⁰ the notice of appeal from such a denial can be consolidated with the appeal already pending.¹⁴¹

Once a vacatur request is procedurally before a district court, the court must determine whether to apply the *Bonner Mall* "exceptional circumstances" standard or the more general discretionary Rule 60(b) standard. The circuits that have addressed this issue differ.¹⁴² In *Valero*

434 (2d Cir. 1962); *Carter v. Rosenberg & Estis, P.C.*, No. 95CIV.10439, 1999 U.S. Dist. LEXIS 131, at *4 (S.D.N.Y. Jan. 13, 1999).

¹³⁹ See *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (4th Cir. 1999). See generally Scott B. Smith, *Settling Federal Cases on Appeal: A Trap for the Unwary*, 61 ALA. LAWYER 396 (2000).

¹⁴⁰ The pending appeal does not divest a district court of its power to deny a vacatur motion under Rule 60(b) motion, although the court cannot grant such a motion unless the case is remanded to it. See *Carter v. Rosenberg & Estis, P.C.*, No. 95 CIV. 10439, 1999 U.S. Dist. LEXIS 131, at *4 (S.D.N.Y. Jan. 13, 1999). Moreover, even if a vacatur request is denied by the circuit court, such a denial does not preclude the parties from seeking vacatur from the district court. See *Morton v. Gober*, No. 99-7191, 2000 U.S. App. LEXIS 22464, at *5 (Fed. Cir. Aug. 17, 2000) (noting the question exists whether vacatur serves the public interest and the "proper course" is to have lower court determine the issue); *GST Tucson Lightwave, Inc., v. Tucson*, No. 97-15328, 1998 U.S. App. LEXIS 1498, at *10 (holding appeal dismissal and vacatur denial do not preclude district court from vacating its own judgment); *Philips Elec. N. Am. Corp.*, No. 96-1426, 1997 U.S. App. LEXIS 28826, at *3 (Fed. Cir. Sept. 30, 1997) (dismissing appeal, denying vacatur, and instructing appellant to present its motion to vacatur to district court, case remand to district court with instruction to consider Philips' request to vacate the attorney fees order of district court after appellant moved to vacate order of district court and to voluntarily dismiss appeal as moot by virtue of settlement agreement with appellee); *Nahrebeski*, 41 F.3d at 1222. In *Nahrebeski*, the parties jointly requested a dismissal of appeal, because the case had been settled, and requested the district court judgment to be vacated. The court of appeal held that no "exceptional circumstances" present to vacate; the appeal was dismissed as moot "without prejudice to the right of either party to move the District Court under Fed. R. Civ. P. 60(b) that it vacate its judgment." *Id.*

¹⁴¹ See *Fobian*, 164 F.3d at 891.

¹⁴² Compare *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir. 2000) (holding *Bonner Mall* standard "largely determinative" at district court level), and *Evans v. Mullins*, 130 F. Supp. 2d 774, 776 (W.D. Va. 2001) (citing *Valero* to support "a district court's decision whether to vacate its own judgment is equitable in nature, and that there is a general presumption against vacatur."), with *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1167-70 (9th Cir. 1998) (holding district courts should have

Terrestrial Corp. v. Paige,¹⁴³ the Fourth Circuit stated that the “standards” for vacatur due to mootness related to settlement under Rule 60(b) are “essentially the same” as the *Bonner Mall* standard applicable to appellate courts.¹⁴⁴ The court held that the *Bonner Mall* “considerations that are relevant to appellate vacatur for mootness are also relevant to, and likewise largely determinative of, a district court’s vacatur decision for mootness under Rule 60(b)(6).”¹⁴⁵ The Eighth and Ninth Circuits, however, maintain that district courts have broader discretion under Rule 60(b) than appellate courts do under *Bonner Mall*.¹⁴⁶ According to decisions in these circuits, a district court may vacate its own judgment even in the absence of exceptional circumstances, provided that the Rule 60(b) “balancing of equities” test is satisfied.

At the district court level, many courts have applied the reasoning of *Bonner Mall* to Rule 60(b) motions to vacate judgments as part of a settlement arrangement,¹⁴⁷ with differing results.¹⁴⁸ In those existing

broader discretion than *Bonner Mall* standard to make the equitable determination whether to grant vacatur or not), and *Nahrebeski*, 41 F.3d at 1222 (8th Cir. 1994).

¹⁴³ *Valero*, 211 F.3d at 112.

¹⁴⁴ *Id.* at 117.

¹⁴⁵ *Id.* at 121.

¹⁴⁶ See *Am. Games*, 142 F.3d at 1167–69; *Nahrebeski*, 41 F.3d at 1222.

¹⁴⁷ See, e.g., *Allen-Bradley Co. v. Kollmorgen Corp.*, 199 F.R.D. 316, 318 (E.D. Wis. 2001) (stating “much of the underlying justification” in *Bonner Mall* can be “usefully employed” in determining vacatur request by district court); *Dubrowsky v. Estate of Perlinder*, 268 B.R. 6, 8 (E.D.N.Y. Oct. 6, 2001) (applying *Bonner Mall* standard); *Novell, Inc. v. Network Trade Ctr., Inc.*, 187 F.R.D. 657, 661–62 (D. Utah 1999) (applying *Bonner Mall* standard); *Carter v. Rosenberg & Estis*, No. 95 CIV 10439, 1999 U.S. Dist. LEXIS 131, at *10 (S.D.N.Y. Jan. 13, 1999) (relying upon *Bonner Mall*); *In re Fairchild Aircraft Corp.*, 220 B.R. 909, 917 (Bankr. W.D. Tex. 1998) (holding the rationale announced in *Bonner Mall* applies to vacatur request); *Nat’l Union Fire Ins. Co. v. Cohen*, No. 92CIV9500 (LMM), 1997 U.S. Dist. LEXIS 16017, at *9–10 (S.D.N.Y. 1997) (citing *Bonner Mall* in articulating standard); *Avellino v. Herron*, 181 F.R.D. 294, 297 (E.D. Pa. 1998) (applying *Bonner Mall* standard); *Jewelers Vigilance Comm., Inc. v. Vitale Inc.*, 177 F.R.D. 184, 186–87 (S.D.N.Y. 1998) (applying *Bonner Mall* standard to vacatur motion under Rule 60(b)); *Vladimir v. U.S. Banknote Corp.*, 976 F. Supp. 266, 267 (S.D.N.Y. 1997) (considering requirements of *Bonner Mall*); *Keeler v. Mayor and City Council of Cumberland*, 951 F. Supp. 83, 84 (D. Md. 1997) (applying *Bonner Mall* standard to vacatur motion under Rule 60(b)); *Nat’l Union Fire Ins. Co. v. Cohen*, No. 92CIV9500 (LMM), 1997 U.S. Dist. LEXIS 16017, at *9–10 (S.D.N.Y. 1997) (citing *Bonner Mall* in articulating standard); *Agee v. Paramount Communications, Inc.*, 932 F. Supp. 85, 88 (S.D.N.Y. 1996) (applying *Bonner Mall* standard to Rule 60(b) motion); *Lindsey v. Metro Life Ins. Co.*, 929 F. Supp. 1435, 1436 (D. Wyo. 1996) (citing *Bonner Mall* in articulating considerations); *Stolz v. Am. Int’l Life Assurance Co. of N.Y.*, 922 F. Supp. 435, 436 (W.D. Wash. 1996) (applying *Bonner Mall* principles at district court

decisions where the court noted that settlement occurred within the context of an appellate mediation program, that factor attracted no consideration other than a passing reference in describing the factual background.¹⁴⁹

IV. IMPLICATIONS OF APPLYING THE *BONNER MALL* STANDARD WITHIN APPELLATE MEDIATION FRAMEWORK

What are the implications of the concurrent, yet wholly uncoordinated, development of case law standards for post-judgment vacatur to assist settlement and the growing institutionalization of court appellate mediation programs? Consider the following scenarios:

level); *Krolikowski v. Volanti*, No. 95 C 1254, 1996 U.S. Dist. LEXIS 11228, at *4–5 (N.D. Ill. Aug. 1, 1996) (relying upon “principles enunciated” in *Bonner Mall*); *Bailey v. Blue Cross/Blue Shield of Va.*, 878 F. Supp. 54, 55 (E.D. Va. 1995) (applying *Bonner Mall* standard to vacatur motion under Rule 60(b)); *Alexander v. Perrill*, 872 F. Supp. 722 (D. Ariz. 1995) (applying *Bonner Mall* standard); *Nat’l Union Fire Ins. Co. v. Cohen*, No. 92CIV9500 (LMM), 1997 U.S. Dist. LEXIS 16017, at *9–10 (S.D.N.Y. 1997) (citing *Bonner Mall* in articulating standard).

¹⁴⁸ *Compare* *Novell, Inc. v. Network Trade Ctr., Inc.*, 187 F.R.D. 657 (D. Utah 1999) (citing and following *Bonner Mall*, granting vacatur motion), *Alexander v. Perrill*, 872 F. Supp. 722 (D. Ariz. 1995) (citing and following *Bonner Mall*, granting vacatur motion), *Vladimir*, 976 F. Supp. at 267–68 (considering the requirements of *Bonner Mall*, and finding “special circumstances”), *Lindsey*, 929 F. Supp. at 1436 (finding “ample exceptional circumstances” to justify vacatur as requested by the parties), *Nat’l Union Fire*, 1997 U.S. Dist. LEXIS 16017 (citing *Bonner Mall* in articulating standard and grants vacatur), and *In re Fairchild*, 220 B.R. at 297 (granting vacatur and emphasizing “extraordinary nature of relief requested” and “equitable circumstances” present), *with Carter*, 1999 U.S. Dist. LEXIS 131, at *10 (denying request to vacate), *Agee*, 932 F. Supp. at 88 (denying request for vacatur), *Jewelers Vigilance*, 177 F.R.D. at 188 (denying request for vacatur), *Keeler*, 951 F. Supp. at 85 (denying request for vacatur), *Bailey*, 878 F. Supp. at 56 (denying request for vacatur), *Avellino*, 181 F.R.D. at 297–98 (denying request for vacatur), *Krolikowski*, 1996 U.S. Dist. LEXIS 11228, at *10 (denying request for vacatur), *Austin*, 181 F.R.D. at 286 (denying request to vacatur), *Allen-Bradley*, 199 F.R.D. at 320 (denying request to vacate), and *Stolz*, 922 F. Supp. at 437 (denying request to vacate).

¹⁴⁹ *See, e.g., Lindsey*, 929 F. Supp. at 1435 (ordering parties to submit to non-binding mediation); *Stolz*, 922 F. Supp. at 435 (involving parties’ request to vacate after settlement reached in mediation pursuant to the Ninth Circuit mediation program); *In re Fairchild*, 220 B.R. at 17 (noting case settled within the Sixth Circuit mediation program); *Russell v. Turnbaugh*, 774 F. Supp. 597 (involving litigants who informed Tenth Circuit at conference that if district court orders were vacated, they would stipulate to dismiss the case with prejudice and withdraw the appeal); *Nestle Co. v. Chester’s Mkt., Inc.*, 596 F. Supp. 1445, 1446 (mentioning Second Circuit CAMP program), *rev’d*, 756 F.2d 280 (2d Cir. 1985).

Scenario One. An appellate mediation program is in place, which mandates participation. Counsel duly participate with “as much authority as feasible” to settle the case.¹⁵⁰ The mediation is held and a settlement is reached that is contingent upon obtaining vacatur of the lower court judgment. Will a court—whether at the circuit or district court level—deny the request because the appellant fits within the group of litigants that the *Bonner Mall* Court categorized as voluntarily “stepping off” the appellate review path?¹⁵¹ Most likely yes, under the present standard focused on whether a party’s voluntary conduct caused the mootness of an appeal. Yet, is not a core purpose of appellate mediation programs to encourage and in most instances, require parties to temporarily step off the appeal track to explore whether a consensual resolution can be reached?

Scenario Two. A mediation is scheduled in a circuit program that allows a party to opt out under certain circumstances if a party so requests. Both parties participate in the mediation and a settlement is reached that is contingent upon obtaining vacatur of the lower court judgment. When assessing the vacatur request, will a court view the appellant as “stepping off” the appeal path because it participated in a successful mediation? If so, should appellate mediation programs be required to disclose to parties prior to participation that if vacatur of the lower court judgment is required for settlement, participation is a futile exercise?

The above two scenarios begin to demonstrate the anomalies that can arise when a vacatur request results from participation in an appellate mediation program. The consequences include strained judicial reasoning, less effective appellate mediation programs, and the specter of diminishment of public confidence in the orderly operation of the judicial system because case law and court programs are at cross-purposes.

A. *Strains Judicial Reasoning*

From the very start, the *Bonner Mall* framework is strained when applied to consensual settlements reached during appellate mediation programs. First, the *Bonner Mall* standard was created in the context of a vacatur request that was opposed by one of the settling parties.¹⁵² Within appellate mediation programs, the goal is to assist the parties reach a consensus on settlement terms, and any resulting, unopposed vacatur requests should not be forced into the narrow *Bonner Mall* framework. Second, the *Bonner Mall*

¹⁵⁰ See *supra* Part II.C.

¹⁵¹ See *supra* Part II.B.

¹⁵² See *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 20 (1994).

Court was faced with a vacatur request of a circuit court opinion. By contrast, at issue in an appellate mediation program is an unreviewed district court opinion. Concerns about the impact of vacatur on precedent for unreviewed district court decisions should not be viewed in the same pressing manner as vacating circuit court decisions. Unlike appellate court decisions, district court opinions are not considered binding precedent in other cases.¹⁵³

Moreover, a party who voluntarily settles a pending appeal and seeks vacatur of the lower court judgment as part of that settlement carries an extremely heavy burden under the current application of *Bonner Mall*. Absent "extraordinary circumstances," the vacatur request will not be granted because of the party's voluntary conduct in mooted the appeal by settling.¹⁵⁴ The anomaly that arises, however, is when the vacatur request is part of a settlement that occurred in the context of a court mediation program that has the exploration and expedition of settlement as its primary focus.¹⁵⁵ The courts benefit greatly from settlements that occur in these appellate mediation programs that they established and in which they place parties. Absent participation in the program, which is often mandatory, the settlement may very well have not occurred. Why should the appellant have to bear all of the responsibility for abandonment of an appeal in this context? Moreover, how "voluntary" should the abandonment of the appeal be deemed?

Under vacatur case law, courts ignore the impact of these judicial programs, including their mandatory components, in any settlement-related vacatur request. However, circuit courts are managing their dockets in part by using court mediation programs, financing these programs with public funds, actively assisting parties in exploring settlement options, and requiring participation in the programs in most instances.¹⁵⁶ Judicial reasoning under these circumstances that denies a resulting vacatur request

¹⁵³ See, e.g., *Russman v. Bd. of Educ.*, 260 F.3d 114, 122 n.2 (2d Cir. 2001) ("When a case becomes moot in one of the Court of Appeals, [as opposed to at the Supreme Court], it is usually a district court's decision that will be vacated, and its precedential value is, of course, limited to only its persuasive effect."); *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 567 (2d Cir. 1994) (holding even an affirmance without opinion of district court ruling not deemed a precedent); *Ying Jing Gan v. N.Y.*, 996 F.2d 522, 529-30 (2d Cir. 1993) (holding qualified immunity only available based on Supreme Court and circuit court rulings); *IBM Credit Corp. v. United Homes for Aged Hebrews*, 848 F. Supp. 495, 497 (S.D.N.Y. 1994) (holding district court decision not binding precedent).

¹⁵⁴ See *supra* Part III.B.

¹⁵⁵ See *supra* Parts II.B.-II.C.

¹⁵⁶ See *supra* Part II.

on the basis that the party voluntarily abandoned its appeal, without taking into account the court's active role in leading parties towards settlement, is incomplete.

Another strain on jurisprudential reasoning arises when a vacatur motion to assist a settlement reached during mediation is denied on the basis of diminishment of precedent.¹⁵⁷ By placing parties into mandatory mediation programs with their core goal of assisting settlements, are not courts themselves contributing to the diminishment of precedent? How can these same courts deny a settlement-related vacatur request resulting from a court mediation program on the grounds that precedent is being diminished?

Moreover, a review of other court practices weakens reliance upon loss of precedence as a valid reason to deny vacatur to assist settlement. Presently, many courts are sanctioning the use of mandatory arbitration programs to resolve a wide array of contractual and statutory claims, including consumer and employment claims.¹⁵⁸ However, arbitration decisions generally do not create precedent for either the court or other arbitrators facing the same issues. Moreover, as a docket management technique, appellate courts have begun issuing unpublished opinions at an increasing rate, which has caused concern for numerous reasons, including the diminishment of precedent.¹⁵⁹ For courts to stress the loss of precedent

¹⁵⁷ See *supra* Part III.

¹⁵⁸ See Cole *supra* note 90, at 1199.

¹⁵⁹ A hotly debated issue is court rules that bar the citation of unpublished circuit court decisions as precedence or persuasive authorities. See *Hart v. Massanari*, No. 99-36472, 2001 WL 1135601, at *1 (9th Cir. Sept. 24, 2001) (holding that unpublished decisions cannot be cited in briefs, even as persuasive authorities); *Anastasoff v. U.S.*, 223 F.3d 898, 899-90 (8th Cir. 2000) (barring citation of unpublished decisions unconstitutional), *vacating as moot*, 235 F.3d 1054 (8th Cir. 2000) (vacating and remanding due to mootness). See also Jason Hoppin, *Ninth Circuit Sticks to Its Opinion Policy* (Sept. 26, 2001), available at http://store.law.com/search_results?content.asp?lsrotype=site&lqry=9th+circuit+sticks+to+its+opinion+policy+brodttyp=&srchmode=quick&scope=1&srchconshd=&srchareaid=; Ganzfried, *supra* note 16, at 532 ("Only the written opinion constitutes precedent binding on subsequent panels of the court and on the district courts within the circuit."). However, circuit courts are increasingly deciding appeals without publishing their decisions. See MCKENNA ET AL., *supra* note 1, at 19, 21 tbls.11, 13 (reporting national average of opinion publication percentages in twelve regional courts of appeals for 1998 was 28% as compared to 38% in 1987); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 240 (1998). For example, in the Ninth Circuit, where unpublished decisions cannot be cited in briefs even as persuasive authorities, 84% of its cases are decided without publishing the decisions, the third

as a reason to deny a settlement-related vacatur rings hollow under these circumstances.¹⁶⁰

B. *Limits Effectiveness of Mediation Programs*

Another anomaly that arises when the *Bonner Mall* standard is applied to vacatur requests arising from appellate mediation programs involves the effectiveness of the mediation process itself. Within an appellate mediation program, by definition the lower court decision is the reason that the parties are participating in the mediation. Yet, the *Bonner Mall* constraints prevent parties and the mediator from fully and creatively exploring alternative solutions to appeals by rigidly narrowing the options available for addressing the lower court decision.

Moreover, a dilemma arises when an appealing party is ordered into appellate mediation before the appeal can proceed. The appellate mediation programs require a party's representative to possess settlement authority,¹⁶¹ and a few programs explicitly require good faith participation.¹⁶² If, as a result of such participation, a settlement is reached that includes a vacatur request, the appellant will be deemed to have voluntarily abandoned its appeal—a factor that weighs heavily against vacatur. Under the current case law standard, if the appellant needs the lower court decision to be vacated to settle, participation in mediation can only be superficial.

C. *Jeopardizes Public Confidence in Orderly Operation of Judiciary*

In *Bonner Mall*, the U.S. Supreme Court stressed the importance of public trust in the judicial system and its orderly operation.¹⁶³ The case law reveals a great concern that such trust can be seriously undermined if

highest of any federal appellate court, according to statistics for the Administrative Office of the U.S. Courts.

¹⁶⁰ See generally Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2032 n.23 (1999).

¹⁶¹ See *supra* Part II.C.

¹⁶² See *supra* Part II.C.

¹⁶³ U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26–27 (1994). See also *Evans v. Mullins*, 130 F. Supp. 2d 774, 777 (W.D. Va. 2001) (denying vacatur on grounds that the public has an interest in the integrity of the judiciary and vacatur in this case would undermine that interest); *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1355, 1357–58 (S.D.N.Y. 1995) (denying vacatur request after balancing countervailing interests, stressing that by conditioning settlement and waiver of an appeal upon vacatur “placed in issue the integrity of the judicial process”).

judgments and decisions are vacated purely on the basis of the parties' settlement arrangement because the public will perceive courts and their precedent as "for sale."¹⁶⁴ However, missing from this analysis is the potential damage that the judicial system suffers when courts fail to take into account their role in placing parties into court-financed mediation programs that encourage parties to reach a consensual resolution instead of continuing their appeal.

The public, as taxpayers, subsidizes the appeal process and mediation programs by bearing much of the costs of the public court system.¹⁶⁵ The courts are spending public funds to create and operate these appellate mediation programs to more efficiently manage their dockets by actively assisting parties in finding solutions other than pursuing their appeal at additional costs to the parties and the courts. Yet, when that cost-savings process works by resulting in a settlement, if the settlement includes a vacatur request, then a fundamental disjunction occurs. Not only have public funds been used inefficiently by underwriting participation in the court mediation program, the parties must continue their appeal, which will cost additional public funds. Simply put, the public is providing funds for a system that is at odds with itself. Is this an efficient use of the courts' and the public's resources?

Such an inconsistent stance can only undermine public confidence and trust in the orderly operation of the courts. These two lines of court development—vacatur case law and appellate mediation programs—I contend, need to be reconciled to maintain judicial integrity.

V. PROPOSAL FOR REFORM: THE FACTORING OF APPELLATE MEDIATION PROGRAMS INTO VACATUR CASE LAW

If the judicial system is to retain the public's confidence in its orderly operation and, by extension, its integrity, several possible approaches to reform exist. At one end of the spectrum is a reform proposal to simply modify the screening process for appellate mediation programs.¹⁶⁶ Appellate mediation programs could screen out cases when vacatur is required to settle the case.¹⁶⁷ Requiring appellate mediation programs to conduct such a

¹⁶⁴ Resnick, *Managerial Judges*, *supra* note 6, at 422–24. *See, e.g.*, Fiss, *supra* note 6, at 1076–78.

¹⁶⁵ *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements*, 75 NOTRE DAME L. REV. 221, 259 (1999).

¹⁶⁶ *See supra* Part II.B.3.

¹⁶⁷ Some of the programs' screening guidelines are capable of identifying a vacatur issue. *See supra* Part II.B.3.; *infra* pp. 425–30 app.

screening disclose is on its face an easily implemented solution.¹⁶⁸ However, this option moves the court appellate programs toward less inclusiveness and thus, fewer opportunities for the court, parties, and public to reap the many benefits of these programs.¹⁶⁹

At the other end of the reform spectrum is a proposal to reverse the applicable standard. Instead of denying vacatur absent exceptional circumstances, the case law (or legislation) could provide that post-judgment vacatur to assist settlement should be *granted*, absent exceptional circumstances. However, this reform path touches on many of the deep jurisprudential and public policy issues underlying the vacatur debate¹⁷⁰ and doubtless would require further study and development to justify the adoption of this approach as a reform measure.¹⁷¹

¹⁶⁸ For example, the Eleventh Circuit Mediation Program has prepared a document entitled *Mediation and Guidelines for Effective Mediation Representation*. The document contains a section captioned "What Participants Can Expect," which includes the following: "The parties and the mediator will then discuss [at the mediation], either jointly or separately, and in no particular order, the following topics: . . . (7) any procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand, etc.)." ELEVENTH CIRCUIT MEDIATION PROGRAM, *MEDIATION AND GUIDELINES FOR EFFECTIVE MEDIATION REPRESENTATION* 18–19. Rather than wait to raise the issue after the mediation is scheduled, a screening could occur for vacatur obstacles prior to holding any mediation session.

¹⁶⁹ See *supra* Part II.

¹⁷⁰ See *supra* Part III.A.

¹⁷¹ As an example of the trend against such a reverse presumption, two years before the U.S. Supreme Court decision in *Bonner Mall*, the California Supreme Court reached the opposite conclusion in *Neary v. Regents of the University of California*, 834 P.2d 119, 120 (Cal. 1992). *Neary* established that courts should ordinarily grant parties' stipulated request for a reversal, *absent* "extraordinary circumstances." *Id.* at 120. The court held that when the parties agree to settle their dispute, and as part of their settlement stipulate to a reversal of the trial court judgment, the court of appeal should grant their request absent a "showing of extraordinary circumstances that warrant an exception" to this general rule. *Id.* See generally, Harmon, *supra* note 85. However, Justice J. Anthony Kline of the First District Court of Appeals, refused to apply the *Neary* rule as a "matter of conscience" in a dissenting decision that received considerable attention, including a charge by the California Commission on Judicial Performance. See also *Morrow v. Hood Communications, Inc.*, 59 Cal. App. 4th 924, 926–28 (Cal. Ct. App. 1997) (Kline, J., dissenting). Effective January 1, 2000, the California legislature passed legislation that brought California law more in line with *Bonner Mall*. See CAL. CIV. P. CODE §§ 128(a)(8)(A), 128(a)(8)(B) (West 2000) (providing stipulation to reverse judgment cannot be granted unless there is "no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal," and the reasons for reversal "outweigh the erosion of public trust" that may result from such action and the

In the middle of the reform spectrum is a proposal that advocates the factoring into the case law of the court's active role in encouraging parties to explore settlement through participation in appellate mediation programs. The "factoring" approach would be applicable to vacatur analysis conducted at either the circuit court or district court levels. For the reasons discussed below, I propose this factoring approach as an effective solution, which enables case law and appellate mediation programs to evolve in tandem.

A. Templates for "Factoring" Approach: Two Circuit Cases That Include Court's Settlement Activities in Vacatur Analysis

Two circuit court decisions have opened the door to factoring into a vacatur analysis the court's role in encouraging parties to explore settlement along the prescribed appellate path. In both cases during appellate argument, the courts urged the parties to explore settlement.¹⁷² Joint settlement-related vacatur requests resulted and the courts granted them. Under the circumstances, the panels hearing the appeals could not find that the appellant "by its own initiative" abandoned its appeal when the court played a role in moving the parties onto a settlement path.¹⁷³

In *Motta v. District Director of Immigration & Naturalization Services*,¹⁷⁴ the First Circuit vacated a district court's decision in aid of settlement after finding exceptional circumstances were present. During oral argument, the panel of judges "raised with counsel the possibility that a settlement might be in the best interests of both parties."¹⁷⁵ At the end of the argument, the court directed counsel to explore settlement and to advise the court within ten days.¹⁷⁶ Thereafter, the parties reached a settlement that included a request to vacate the lower court's decision. The First Circuit

"risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement").

¹⁷² *Major League Baseball Props., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 151–52 (2d Cir. 1998); *Motta v. Dist. Dir. of INS*, 61 F.3d 117, 118 (1st Cir. 1995).

¹⁷³ *Major League*, 150 F.3d. at 152; *Motta*, 61 F.3d at 118.

¹⁷⁴ *Motta*, 61 F.3d at 118.

¹⁷⁵ *Id.*

¹⁷⁶ INS counsel explained that any consensual resolution could require vacating the lower court's decision, because INS was concerned about "establishing what [it] sees as a dangerous and erroneous precedent." *Id.* The case involved INS as a party; as a result, it had not been placed in the First Circuit's mandatory CAMP program because such cases are exempted from the program. See NIEMIC, *supra* note 1, at 18.

found that the “equities favor vacatur”¹⁷⁷ and explicitly acknowledged the role of the court in moving the parties toward settlement:

[The INS] has agreed to consider settlement only at the suggestion of this Court, the proposed settlement being an inexpensive, simple, and speedy way to accommodate the interests of both parties. As the INS has not initiated the relinquishment of its right to the remedy, the same equitable calculus underlying [*Bonner Mall*] is not present. Nor, given this Court’s involvement and initiative in the proceedings, does vacatur in this case implicate the concerns expressed by the [*Bonner Mall*] Court about giving parties undue control over judicial precedents. We see no appreciable harm to the orderly functioning of the federal judicial system by vacating judgment.¹⁷⁸

Under similar reasoning, in *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*,¹⁷⁹ the Second Circuit found satisfaction of the “exceptional circumstances” standard. After losing a preliminary injunction motion, plaintiff-appellant Major League sought an injunction pending appeal from the Second Circuit.¹⁸⁰ During oral argument, the panel suggested that the parties attempt to negotiate a settlement and assigned court staff counsel to mediate their discussions.¹⁸¹ At the end of the day, a settlement was reached that was contingent upon vacatur of the district court decision. The parties informed the court that unless the district court’s preliminary injunction order was vacated, in future trademark cases involving the Major League a defense of acquiescence could be asserted against it.¹⁸² Because of the possibility of a collateral estoppel use of the district court order, settlement was contingent upon such vacatur.¹⁸³

¹⁷⁷ *Motta*, 61 F.3d at 118.

¹⁷⁸ *Id.* Indeed, the court stated that it would be “inequitable” to place the public’s interest over the parties’ best interests, which included settlement with a vacatur provision. Constituting part of its analysis also were the statements that it was “absolutely clear” that settlement would not occur absent vacatur and “a win for both sides” results with a settlement. Under all these circumstances, including the court’s role, “exceptional circumstances” exist. *Id.* at 118–19.

¹⁷⁹ *Major League Baseball Props., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 149 (2d Cir. 1998).

¹⁸⁰ See *supra* note 124.

¹⁸¹ *Id.* at 151.

¹⁸² See *id.*

¹⁸³ *Id.*

Citing *Motta*, the Second Circuit found that "exceptional circumstances" existed and vacated the district court opinion.¹⁸⁴ The court explicitly mentioned its involvement in directing the parties into mediation when explaining its finding of exceptional circumstances.¹⁸⁵

In sum, both courts considered, rather than ignored, their role in assisting the parties reach a settlement through court programs and orders when evaluating the vacatur request.

B. Factoring Approach Achieves Several Important Goals

To ease the judicially strained application of the *Bonner Mall* standard to consensual vacatur requests that result from participation in appellate mediation programs,¹⁸⁶ a more elastic standard is necessary and appropriate. Courts need to acknowledge their role in placing parties into settlement processes. Following the guidance provided by the *Motta* and *Major League* decisions,¹⁸⁷ I propose that courts should factor their role in moving the parties off the appellate path and into court mediation sessions as one of the several variables to consider when assessing a settlement-related vacatur request. By so doing, the analysis would not begin and end by courts stating that a party voluntarily settled a case on appeal. A greater effort would be made to integrate the realities of appellate mediation programs in vacatur case law. Such an approach would integrate the public interest in an orderly judicial system and the development of appellate mediation programs. It also would correct the strained judicial application of *Bonner Mall* to vacatur requests arising out of participation in appellate mediation programs.

1. Integrates Public Interest in Orderly Judicial System and Fosters Development of Appellate Mediation Programs

To justify the denial of settlement-related vacatur requests, courts often rely upon the purportedly inefficient use of judicial resources inherent in granting such requests. It has been posited that a more lenient standard would encourage parties to waste judicial resources in their "gamble" to see the outcome at the trial level before committing to settlement exploration.¹⁸⁸

¹⁸⁴ See *supra* note 127.

¹⁸⁵ *Id.* at 151.

¹⁸⁶ See *supra* Part IV.A.

¹⁸⁷ See *supra* Part V.A.

¹⁸⁸ See *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 28 (1994) ("Some litigants, at least, may think it worthwhile to roll the dice rather than settle

Yet, what about the judicial resources committed to appellate mediation programs? These programs are financed by the courts.¹⁸⁹ Is it not sound jurisprudence to take parties' participation in an appellate mediation program and the corresponding use of judicial resources dedicated to that program into account when a vacatur request arises out of a successful appellate mediation?

The public has an undeniable interest in judicial economy. Courts must begin to develop a consistent position between the development of court mediation programs and vacatur analysis to serve this public interest. The narrow confines of the *Bonner Mall* "exceptional circumstances" standard needs to be adjusted to reflect the realities of these programs designed to conserve limited judicial resources. A judicial system that commits significant resources to the operation of appellate mediation intended to foster settlement, yet ignores the role that these programs have in assisting parties reach settlement when evaluating a vacatur request, is not an orderly one. Rather, it is a system where its separate, however, interlocking parts are at cross-purposes. Such a disjunction results in the inefficient use of private and public resources and undermines public confidence in the administration of the judicial system. A factoring approach would correct this anomaly.

A factoring approach also would foster the continued growth of appellate mediation programs in an effective manner. Participation to the fullest extent would be feasible because the parties would be able to completely explore all options and possibilities, including vacatur. Mediators would be able to more fully explore all settlement possibilities.

2. *Corrects Strained Judicial Application of Bonner Mall*

Rigid application of the *Bonner Mall* standard to the more typical consensual vacatur request arising from appellate mediation programs results in strained judicial reasoning. A factoring approach corrects this strain and provides a means to soundly address both of the touchstones of *Bonner Mall*—party conduct and public confidence in the orderly operation of the judicial system.

Under a framework provided in the *Motta* and *Major League* cases, courts can analyze a vacatur request under the *Bonner Mall* standard and

in the district court . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.") See also *Evans v. Mullins*, 130 F. Supp. 774, 776 (W.D. Va. 2001) ("Judicial economy is not achieved where, as here, the time and resources attendant to bringing a trial to fruition have already been spent, only to be undone because the parties have settled at the end of the day.").

¹⁸⁹ See *supra* Part II.B.2.

include in that analysis the court's involvement in directing the parties toward settlement. Under such an approach, if settlement occurs in an appellate mediation program, a court will not automatically deny a vacatur request by finding that an appellant unilaterally abandoned its appeal. Rather, further analysis will be conducted to determine if vacatur is appropriate by taking into account the totality of the circumstances.

A factoring approach can be used at the district court level as well. In many instances, the district court is faced with the issue of whether to vacate its decision to facilitate a settlement on appeal in the form of a Rule 60(b) motion.¹⁹⁰ The vast majority of published decisions reveal that the district courts are following the reasoning of *Bonner Mall* instead of a broader discretionary standard under Rule 60(b).¹⁹¹ A factoring approach would ease the strained judicial reasoning that occurs when district courts grant a vacatur request within the rigorous *Bonner Mall* standard. To the extent the district court applies a more discretionary standard under Rule 60(b), a factoring approach would simply add another consideration to the analysis.

C. Potential Negative Consequences Do Not Outweigh Benefits

Under a factoring approach, courts—whether at the circuit or district level—would continue to weigh the public interest concerns at stake against the parties' reasons for requesting vacatur when deciding a post-judgment vacatur request to assist settlement.¹⁹² Based upon such a weighing, a court would decide whether vacatur is appropriate. However, under a factoring approach, appellate mediation programs would not be ignored. Arguably, a factoring approach could result in some negative developments and consequences, including the possibility of parties using appellate mediation strategically to hedge their risks and increasing confidentiality complications for the programs if the mediator becomes involved in vacatur motion practice. However, I contend that such potential negative effects could be adequately addressed.

1. Addressing Improper Strategic Use of Mediation

If participation in an appellate mediation program may weigh favorably in a settlement-related vacatur request, will parties be more likely to gamble and settle only after the lower court ruling or judgment is issued and its

¹⁹⁰ See *supra* Part III.D.

¹⁹¹ See *supra* Part III.D.

¹⁹² See *supra* Parts III.B.–III.D.

impact is assessed? Arguably, the repeat litigants, often the powerful corporate members of society, may employ such tactics.¹⁹³ Indeed, courts have viewed vacatur requests by such repeat litigants as “dangerous.”¹⁹⁴

Unfortunately, lack of empirical evidence in this area requires reliance upon logic and experience. It is reasonable to assume that the availability of vacatur itself may delay settlement in some instances until after issuance of a ruling.¹⁹⁵ It is also reasonable to assume that if parties know that by participating in an appellate court mediation program, a court may not as readily deny their vacatur request, they may build such participation into their case strategy. However, even assuming this strategic tack, the resulting abuse of such an inefficient (and improper) use of court resources by the parties can be checked on a case-by-case basis. The possibility under these controlled circumstances, I submit, should not justify the current trend of completely ignoring participation in all instances for all parties.

2. Confidentiality Concerns

Confidentiality is a critical component of appellate mediation programs.¹⁹⁶ Program rules usually prohibit mediators, attorneys, and parties from disclosing the substance of mediation sessions to any judge or nonparty. Generally not considered confidential are items such as the fact that the mediation took place, the bare results of the mediation (e.g., settled, not settled), and any resulting post-mediation filing entered on the docket.¹⁹⁷

If participation in appellate mediation programs becomes one of the factors that courts will consider in deciding a settlement-related vacatur request, there is the possibility that parties may seek to waive certain confidentiality protections to enable the mediator to assist in their vacatur application. For example, they may seek the mediator’s assistance in deciding whether to bring the request before the district court by asking the

¹⁹³ A “repeat player”

can consider “long term” implications of judicial decisions in a way that almost all Plaintiffs, who do not usually reappear in this Court, do not. . . . Thus, if permitted by the Court . . . the [repeat player] might be tempted to use the technique of settlement conditioned on vacatur to eradicate unfavorable decisions.

Reidell v. U.S., 47 Fed. Cl. 209, 213 (Fed. Cl. 2000).

¹⁹⁴ *Id.* at 212.

¹⁹⁵ *In re Hiller*, 179 B.R. 253, 261 (D. Colo. 1994) (“[T]his Court finds that vacatur does not necessarily encourage settlements early in litigation and, in fact, may encourage litigants to delay serious settlement discussions until after trial and pending an appeal.”).

¹⁹⁶ See *supra* Part II.B.1.

¹⁹⁷ Niemic, *supra* note 15, at 13–14; see *supra* note 45.

mediator to make certain preliminary inquiries to the court. However, such a possibility raises many serious implications about confidentiality and the role of the mediator.¹⁹⁸ If a mediator becomes involved in vacatur motion practice, the mediator's neutrality may be compromised in a specific case and as a matter of general perception. Such an occurrence could have a serious impact on the quality of appellate mediation programs.

Moreover, any informal communications between the mediator and either the circuit or district court concerning a vacatur motion, even at the parties' request, may place the mediator in a tense situation involving the limited scope of what he is authorized to reveal and the potential breadth of the court's inquiries. The confidentiality protections may become blurred.

If a factoring approach is adopted, careful consideration need be given to how to address these confidentiality concerns. For example, court mediation rules could be amended to make specific provisions. To eliminate any encroachment on confidentiality in mediation, the safest course would be to preclude any involvement by mediators in the parties' vacatur requests.

VI. CONCLUSION

Appellate mediation programs have become an integral part of circuit courts' case management systems. If judicial integrity and public confidence in the orderly operation of the judicial system are not to be diminished, vacatur analysis for post-judgment settlements will have to change. In vacatur case law, courts need to be made accountable for their active role in detouring parties from the traditional appellate path when parties participate in court-financed or court-mandated appellate mediation programs. Incorporation of the courts' role into vacatur analysis would foster several important goals. First, it would increase the integrity of the courts through acknowledging their active role in directing parties to the "path" of settlement. Second, vacatur case law and appellate mediation programs would be evolving in tandem, not in opposition. Third, the public interest in the orderly operation of the judicial system would be strengthened rather than diminished. The factoring of appellate mediation programs into vacatur case law would foster the best roles and aspirations of all concerned—the court as resolver of active controversies, the parties as full participants in the resolution of their disputes, and the public as benefactors of an orderly judicial system.

¹⁹⁸ See generally UNIF. MEDIATION ACT (2001); UNIF. MEDIATION ACT reporters' notes (2001).

APPENDIX

Set forth below is a brief summary of the pre-argument conferencing, mediation, or settlement programs of each of the regional courts of appeals and the Federal Circuit. The summary highlights case eligibility, selection process, and participation requirements (mandatory or voluntary). Information provided below is from three sources: *Mediation and Conference Programs in the Federal Courts of Appeals*;¹⁹⁹ *Case Management Procedures in the Federal Courts of Appeals*;²⁰⁰ and responses by circuit court programs to a letter dated October 19, 2001, requesting a review of the information below.²⁰¹

I. FIRST CIRCUIT: CIVIL APPEALS MANAGEMENT PROGRAM
(CAMP)—IMPLEMENTED 1992

Eligible Case Types. All civil cases, except pro se cases, original proceedings (such as petitions for writs of mandamus), INS cases, NLRB summary enforcement actions, and cases with unresolved jurisdictional problems. No prisoner cases (including habeas corpus petitions).

Selection Process. “[C]lerk’s office refers all eligible cases to the Office of Settlement Counsel, where they are scheduled for a conference.”²⁰² Moreover, “at any time during a case, a circuit judge may refer any matter to the program upon motion or sua sponte;”²⁰³ before or after oral argument.

Participation. Mandatory. Attorneys with full settlement authority. Clients not required, but permitted to attend.

II. SECOND CIRCUIT: CIVIL APPEALS MANAGEMENT PLAN
(CAMP)—IMPLEMENTED 1974

Eligible Case Types. All civil cases, except pro se cases and original proceedings. No habeas corpus petitions or 28 U.S.C. § 2255 cases.

¹⁹⁹ NIEMIC, *supra* note 1.

²⁰⁰ MCKENNA ET AL., *supra* note 1, at 26–32 tbl.17

²⁰¹ Letters from Kathleen M. Scanlon, Esq., Senior Vice President and Director of CPR Public Policy Projects, CPR Institute for Dispute Resolution to circuit court mediation programs (Oct. 19, 2001) (on file with the Ohio State Journal on Dispute Resolution). Responses to the letters are on file with the author.

²⁰² NIEMIC, *supra* note 1, at 19.

²⁰³ *Id.*

Selection Process. Nearly all CAMP-eligible cases are scheduled for a conferencing. Moreover, hearing panels may occasionally refer cases to the program after argument but before decision.

Participation. Mandatory. Attorneys with appropriate settlement authority, usually without clients; clients permitted but not required to attend.

III. THIRD CIRCUIT: APPELLATE MEDIATION PROGRAM—IMPLEMENTED 1995

Eligible Case Types. All civil cases, except pro se cases and original proceedings.

Selection Process. “The clerk’s office forwards eligible cases to the program director [who] reviews the case file and decides whether the case should be placed in mediation” based on the issues presented and whether those issues can be mediated and settled.²⁰⁴ If uncertain, the director may talk to counsel. Some cases also enter at the request of one or more parties. Moreover, hearing panels may refer cases to the program just before or after oral argument.

Participation. Mandatory. Lead counsel with settlement authority; clients required to attend.

IV. FOURTH CIRCUIT: OFFICE OF THE CIRCUIT MEDIATOR FOR THE FOURTH CIRCUIT—IMPLEMENTED 1994

Eligible Case Types. All civil cases including agency cases with the exception of pro se cases, prisoner cases and habeas corpus petitions. Original proceedings such as mandamus petitions are not mediated unless an appellate panel requests mediation.

Selection Process. Each of the mediators on staff receive their cases from the clerk’s office on a rotating basis. The individual mediator to whom the cases are assigned makes a determination of case eligibility for mediation. The emphasis is on acceptance of the case. In selecting cases, the mediator gives weight to indications of receptiveness to settlement (including whether a party requested mediation), complexity of case, amount of monetary relief requested, and the nature of the issues (for example, constitutional issues might not be appropriate for mediation). Occasionally, the mediator may talk to counsel of record about prospects for settlement

²⁰⁴ *Id.* at 33.

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before selecting a case. Moreover, hearing panels may refer cases to the program before or after oral argument.

Participation. Mandatory. Lead counsel with settlement authority; clients permitted but not required to attend.

V. FIFTH CIRCUIT: APPELLATE CONFERENCE PROGRAM—IMPLEMENTED 1996

Eligible Case Types. All civil cases, except pro se cases. No prisoner cases.

Selection Process. Conference attorney reviews cases that are eligible for the program and “schedules a conference in cases that appear to have settlement potential, or where the conference might be helpful in narrowing the issues,”²⁰⁵ including procedural issues. The conference attorney schedules a conference in as many eligible cases as resources allow. A party may request inclusion in the program at any time. Moreover, hearing panels may refer cases to the program.

Participation. Mandatory, however, in cases assigned to program parties may decline to participate, or participate further by submitting a letter. Lead counsel required to participate in any scheduled conference; conference attorney may require attendance by parties.

VI. SIXTH CIRCUIT: CIRCUIT MEDIATION CONFERENCE PROGRAM— PERMANENTLY IMPLEMENTED IN 1983 (TRIAL BASIS IN 1981)

Eligible Case Types. All civil cases, except in practice pro se cases, prisoner petitions, tax appeals, agency cases, and cases with unresolved jurisdictional problems.

Selection Process. The chief circuit mediator reviews the pre-argument statement and jurisdictional screening form. The Office of the Circuit Mediator schedules a mediation conference in as many eligible cases as the resources of the office will allow. A party may request inclusion in the program at any time. Moreover, hearing panels may refer cases to the program just before or after oral argument.

Participation. Mandatory. Lead counsel with authority to negotiate. Generally, clients not required to attend.

²⁰⁵ *Id.* at 46.

VII. SEVENTH CIRCUIT: SETTLEMENT CONFERENCE PROGRAM— IMPLEMENTED 1994

Eligible Case Types. All civil cases, except pro se cases, prisoner proceedings, Social Security disability, immigration, and original proceedings. Commercial, employment cases, civil rights, environmental, personal injury, ERISA, bankruptcy, intellectual property, tax, labor, and agency are among the common types scheduled for conferences.

Selection Process. Senior conference attorney screens each eligible case. Conferences are scheduled in as many eligible cases as resources allow. Conferences also can be scheduled at the request of one or more parties. Cases are not ordinarily referred by judicial panels.

Participation. Mandatory. Lead counsel with settlement authority. Parties may also be required to attend and must in any event be available for consultation by telephone.

VIII. EIGHTH CIRCUIT: SETTLEMENT PROGRAM—IMPLEMENTED 1981

Eligible Case Types. All civil cases, except pro se cases, cases dismissed for lack of jurisdiction, cases with unresolved appellate jurisdictional problems, Social Security Administration and agency disability cases, federal income tax cases, original proceedings, interlocutory appeals, and appeals of injunctions under 28 U.S.C. § 1292(a)(1). No prisoner cases.

Selection Process. The director selects eligible cases that appear appropriate for settlement discussions after reviewing documents provided by the clerk's office. Special importance is placed on reviewing any trial court opinions and expressions of interest in settlement on the appeal information form or in appropriate telephone contact. In certain cases, telephone conferences are routinely scheduled without prior contact, subject to the party's option to cancel. Hearing panels rarely refer cases to the Program.

Participation. Voluntary. Client participation is usually required for either personal or telephone conferences.

IX. NINTH CIRCUIT: SETTLEMENT PROGRAM (CIRCUIT MEDIATION PROGRAM)—IMPLEMENTED 1984

Eligible Case Types. All civil cases, except pro se cases, original proceedings, and a few other select categories. No prisoner cases.

Selection Process. Circuit mediators review Civil Appeals Docketing Statement to help them determine which eligible cases are appropriate.

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Following this review and in some cases after telephone calls to counsel of record, the mediators select cases to be conferenced. One of the factors considered is the parties' interest in participating in settlement negotiations. The vast majority of cases are selected prior to briefing. If a case is not selected, counsel may request mediation by submitting a confidential request to the circuit mediator, before or after briefing. A hearing panel may refer a case to the program, which usually occurs after briefing and argument.

Participation. Mandatory. Attorneys, sometimes with clients at mediator's direction.

X. TENTH CIRCUIT: CIRCUIT MEDIATION OFFICE—IMPLEMENTED 1991

Eligible Case Types. All civil cases, except pro se cases and cases with unresolved jurisdictional problems. No habeas corpus proceedings. "Among the many types of cases in the mediation program are bankruptcy appeals, tax appeals, and agency cases such as petitions for review of NLRB decisions" (many other programs contrary).²⁰⁶

Selection Process. The Circuit Mediation Office randomly selects cases from the pool of all newly docketed eligible cases. Parties may request a conference. Moreover, hearing panels may refer cases to mediation just before or after oral argument.

Participation. Mandatory. Lead counsel with settlement authority; circuit mediator may permit or require client to attend.

XI. ELEVENTH CIRCUIT: CIRCUIT MEDIATION OFFICE—IMPLEMENTED 1992

Eligible Case Types. All civil cases are eligible for mediation, except pro se cases and cases with unresolved jurisdictional issues. No prisoner cases.

Selection Process. The clerk's office sends all eligible cases to the Circuit Mediation Office, which reviews the cases and selects a cross-section for mediation. Attorneys are encouraged to request a conference if they believe a conference would be useful. Cases may also be referred to mediation by an active or senior judge of the court of appeals.

Participation. Mandatory. Lead counsel with appropriate settlement authority. Circuit mediators permit and may require parties to attend.

²⁰⁶ *Id.* at 82.

XII. DISTRICT OF COLUMBIA CIRCUIT: APPELLATE MEDIATION PROGRAM—IMPLEMENTED 1987

Eligible Case Types. The program handles a broad range of civil cases. Pro se cases generally are not considered appropriate. No criminal cases.

Selection Process. “Attorneys in the clerk’s office screen most civil and agency cases to determine whether they are appropriate for mediation. The clerk’s office refers cases it believes might be appropriate to the director of dispute resolution” within the circuit executive’s office for another level of review.²⁰⁷ The factors considered by the clerk’s office and the director in determining whether a particular case is appropriate for mediation include nature of underlying dispute, relation of the issues on appeal to underlying dispute, availability of incentives to reach settlement or limit the issues on appeal, susceptibility of the issues to mediation, possibility of effectuating a settlement, number of parties, and number of related pending cases. Although counsel’s views may be solicited, they are not dispositive. Parties are encouraged to request mediation by submitting a request form to the clerk. The Court treats such requests as confidential.

Participation. Mandatory. Attorneys with settlement authority. Clients strongly encouraged, but not required, to attend.

XIII. FEDERAL CIRCUIT: SETTLEMENT DISCUSSION RULE

No pre-argument mediation or conference program. Instead, Federal Circuit Local Rule 33 requires counsel to engage in settlement discussions and file a joint statement of compliance. No involvement of a third-party neutral is required.

²⁰⁷ *Id.* at 95.